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# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

# COURT OF APPEALS

OF

# MARYLAND.

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BY RICHARD W. GILL,

CLERK OF THE COURT OF APPEALS.

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## VOL. VII.

CONTAINING CASES IN 1848 AND 1849.

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# NAMES OF THE JUDGES, &c.,

## DURING THE PERIOD COMPRISED IN THIS VOLUME.

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### OF THE COURT OF APPEALS.

Hon. THOMAS BEALE DORSEY, Chief Judge.
Hon. E. F. CHAMBERS, Judge.
Hon. ARA SPENCE, Judge.
Hon. ALEXANDER C. MAGRUDER Judge.
Hon. ROBERT N. MARTIN, Judge.
Hon. WILLIAM FRICK, Judge.

### OF THE COURT OF CHANCERY.

Hon. JOHN JOHNSON, Chancellor.

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Hon. WILLIAM FRICK, Chief Judge.
Hon. JOHN PURVIANCE, Associate Judge.
Hon. JOHN C. LE GRAND, Do.

OF BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.
Hon. ALEXANDER NISBET, Associate Judge.
Hon. W. G. D. WORTHINGTON, Do.

ATTORNEY GENERAL.

GEORGE R. RICHARDSON, ESQUIRE.

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DECEMBER TERM, 1848.

## WILLIAM H. GARNER *vs.* GEORGE H. SMITH, EXC'R OF E. SMITH.

Certain negroes owned by *S*, remained in his possession until 1832, when they were sent to the farm of his daughter. They continued there until 1845, when they were replevied by the executor of *S*, from *G*. The defendant, *G*, proved, that *S*, in 1841 or 1842, said, he had given nearly all his negroes to his sons and daughter. The plaintiff then proposed to prove the declarations of the daughter, then sole, that her father had said, he would give her one-third of every thing on his farm, *except negroes*, and would loan her one-third of them during his life, and, after his death, would give her one-half of them. HELD, as the defendant relied on the daughter's right of property to maintain his pleas, the declarations made by her, about the time she obtained the slaves, as to the nature and character of her possession, may be used to rebut the evidence offered by the defendant to prove property in her, though her right of property would not be affected by any decision in this case.

APPEAL from *St. Mary's* county court.

This was an action of *replevin*, brought on the 15th July 1845, by the appellee against the appellant, for negro man *Sandy*, aged about twenty-two years, and negro girl *Susan*, aged about twelve years. Pleas, *non cepit*, and property in defendant, and property in a stranger. Replication and issues.

The plaintiff gave in evidence, by *William H. Dunkinson*, that he has known the negroes in controversy since he can recollect, that they were raised by his uncle, *Elwily Smith*, the plaintiff's testator, and were owned and possessed by him, until they were sent, with several other negroes, by the said testator, in *January* 1832, on the farm of the testator's daughter, (then *Mrs. Campbell*,) after the death of her first husband, (now *Mrs. Miles*,) where they have remained ever since, and in the possession of *Mrs. Campbell*, up to her marriage with *Thos. H. Miles*, and since the marriage, in the possession of *Thos. H. Miles*, and employed in working on the said *Campbell's* and *Miles'* farm; that the said *Elwily Smith* did stock the farm of his daughter, *Mrs. Miles*, and furnish her house for her, and sent a large number of negroes, including the negroes in dispute, to said farm, on or about 1st of January 1832.

The defendant then gave in evidence, that he, the witness, was at *E. S's* sometime in 1841 or '42, when the said *E. S.* told the witness, that he had given nearly all the young negroes to his sons at the *south*, and to *Mrs. M.*, his daughter, and that his stock of negroes was old and unable to work his farm, and that he should be obliged to buy negroes for his own use; that he, witness, was one of the assessors of the property in the county in 1841, and, at that time, called on *E. S.* to assess his property, when the said *E. S.* told him, that he had given nearly all his young negroes to his children, (naming *Mrs. Miles* as one,) and that he should be obliged to buy negroes, as his stock of them was old and unable to work his farm, that he gave in twenty odd negroes to the assessors: the witness then went to *Thos. H. Miles*, who gave in from fifteen to twenty negroes, his wife aiding him in doing so.

The plaintiff then offered to prove, by *Cornelius Combs*, that in the fall of 1831, he was called on by *Mrs. C.*, then a widow, and now *Thos. H. Miles'* wife, to go her security for the rent of the farm called "*Chancellor's Point;*" that she, *Mrs. C.*, then told witness, that her father, *E. S.*, had said, he, (her father,) would give her one-third of every thing on his farm to stock her farm, except negroes, and would loan her one-third of his negroes during his life, and, after his death

would give her one-half of them. To the admissibility of which evidence, the defendant objected, but the court, (MAGRUDER, C. J., and KEY, A. J.,) overruled the objection, and permitted the evidence to go to the jury, being of the opinion, that if the said *Mrs. C.* received the negroes in controversy from the plaintiff's testator, as she was the only person, (other than the plaintiff's testator,) who, according to the proof, could claim said negroes while in her possession as stated, her declarations relative to the manner in which she soon afterwards was to get possession of the said negroes were admissible, when offered by the plaintiff to shew that the negroes in controversy were loaned to her, and that she did not claim the said negroes, (while in her possession,) as her property; to which overruling and permission, the defendant excepted.

The verdict and judgment being for the plaintiff below, the defendant appealed to this court.

The cause was argued before DORSEY, C. J., MARTIN and FRICK, J.

By DORSEY for the appellant, and
By CAUSIN for the appellee.

SPENCE, J., delivered the opinion of this court.

Action of replevin, pleas, *non cepit*, property in defendant, and property in a stranger.

The plaintiff offered evidence to the jury, that the negroes were owned and raised by his testator; that they remained in his possession until 1832, when they were sent on the farm of testator's daughter, then *Mrs. Campbell*, after her husband's, *Campbell's*, death, (now *Mrs. Miles*,) where the negroes have remained ever since, in the possession of *Mrs. Campbell*, up to her marriage with *Miles*, and in his possession ever since, and employed by said *Miles* in working on said farm.

And further proved, that *Elwily Smith* did stock the farm of his daughter, *Mrs. Miles*, and sent a large number of negroes, including the negroes in dispute, to said farm, in June 1832.

The defendant proved by a competent witness, that he was at *Elwily Smith's* the plaintiff's testator, in 1841 or 1842, when said testator told witness, that he had given nearly all the young negroes to his sons at the south, and to *Mrs. Miles*, his daughter, and that his stock of negroes was old and unable to work his farm, and that he should be obliged to buy negroes for his own use. The defendant also proved by another witness, that he was assessor in 1841, and, at that time, called on *Elwily Smith* to assess his property; when *Elwily Smith* told him, that he had given nearly all his young negroes to his children, naming *Mrs. Miles* as one, and that he should be obliged to buy negroes, as his stock of them was old and unable to work his farm; that he gave in twenty odd negroes to the assessors; the witness then went to *Thomas H. Miles*, and *Miles* gave in from fifteen to twenty, his wife aiding him in doing so. The plaintiff then offered to prove by *C. Combs*, that in the fall of 1831, he was called on by *Mrs. Campbell*, then a widow, and now *Thomas H. Miles'* wife, to go her security for the rent of the farm called "*Chancellor's Point;*" that *Mrs. Campbell* then told witness, that her father, *Elwily Smith*, had said, he would give her one-third of every thing on his farm, to stock her farm, except negroes, and would loan her one-third of his negroes during his life, and, after his death, would give her one-half of them. To the admissibility of which evidence, the defendant, by his attorney, objected, but the court overruled the objection, and permitted the evidence to go to the jury.

The only question in this case is, whether the testimony given by *Combs*, was legally admissible to go to the jury?

The plaintiff in this case had offered evidence to the jury, to prove property in his testator to the negroes in dispute, and the defendant, without offering any evidence to the jury to prove property in himself, attempted to prove property in *Mrs. Miles*, by a gift from *Elwily Smith*, the plaintiff's testator, to his daughter, *Mrs. Miles*, by the declarations of said *Smith*, made to other persons. Now, although *Mrs. Miles* is not a party to this suit, and her right of property, if she have any, to the negroes involved, will not be affected by the decision in this

case; yet, forasmuch as the defendant has relied on her right of property, and offered evidence to prove it, to defeat the plaintiffs, we see no sound reason why declarations made by her, about the time she obtained the possession of the slaves, as to the nature and character of her possession to them, might not be submitted to the jury, to rebut the evidence offered by the defendant, to prove property in her. The question made for the jury to decide by the evidence, is, whether the slaves were the property of *Mrs. Miles*, by a gift from her father, in June 1832? the declarations made by *Mrs. Miles* about that time, that the negroes were loaned to her by her father, is a fact explanatory of her possession, and may be considered a part of the *res gesta*.

"In general, where the evidence is offered as a mere fact, which is connected with the matter in dispute, and not with a view to affect the party, otherwise than as the actual existence of the fact affects the nature of the transaction itself, then, although it was a transaction between others, yet, as a mere fact, and part of the *res gesta*, it is evidence." *Kolb vs. Whitely, Trustee of Trowbridge and Taylor*, 3 *G. & J.*, 188.

JUDGMENT AFFIRMED.

JOHN B. BROOKE, ADM'R OF ELI S. BALDWIN, *vs.* RICHARD M. WARING.—*December* 1848.

Where the bill of exceptions presents to the county court no question upon the pleadings, none is presented here. In such cases, the questions to be decided arise upon the proof, without reference to the pleadings, which are assumed to be correct.

*B* sold to *W* a slave, and received one hundred dollars on account of the purchase money. The slave was then sick and not delivered, but delivery was promised at a future day, and before it took place, though requested, the slave died. HELD, that *B*, under the circumstances, was entitled to recover the money advanced by him; and that although it may have been after the contract of sale that the defendant promised to refund, yet such promise was not founded upon a *nude pact*.

If the stipulation to deliver at a future day, and in case of failure to refund, formed no part of the original contract, it was still a modification thereof, and as obligatory upon the parties as if originally entered into.

Under the original contract, the failure to deliver the negro, would have bound the vendor to pay whatever amount of damages resulted to the vendee by reason of such failure, and the substitution of a sum certain, as damages by agreement, would not be without consideration.

APPEAL from *Prince George's* county court.

This was an action of *assumpsit*, commenced on the 1st August 1844, by *E. S. Baldwin*, (since deceased,) against the appellee. The issue was joined on the plea of *non assumpsit*. The verdict was for the defendant.

At the trial of this cause, the plaintiff to maintain the issues on his part, offered to prove, that sometime late in the fall of the year 1843, the witness was sent, by the plaintiff's intestate, to the residence of the defendant, to receive a negro girl, which the said defendant had, before that time, contracted to sell to the said plaintiff's intestate, and on which contract the sum of one hundred dollars had been paid; that when he arrived at said defendant's house, the witness was informed by him, that he could not then deliver the negro to the witness, (defendant's agent to receive her,) and the defendant assigned as a reason for such non-delivery, that the negro woman was unwell, and unfit to be delivered to him, but that in ten day's time, she should be left at the house of *Dr. Wyville*, in *Nottingham*, and that witness must come there for her; that witness did go to said *Wyville's* on the day appointed, and the said negro girl was not there, and the said plaintiff's intestate never did receive said negro girl, she having died shortly after said last application for her delivery to him. And the plaintiff further proved to the jury, by another competent witness, that he was present at a conversation between the plaintiff's intestate and the said defendant, which took place at a period of time which elapsed between the two visits of the agent of plaintiff's intestate, for the delivery to him of said negro girl, in which conversation the plaintiff's intestate complained to the defendant, that he had not delivered the said slave to his agent first mentioned in the preceding part of this bill of exceptions, and the defendant informed said plaintiff's intestate, that he need give himself no uneasiness about the said sum of one hundred dollars, that he, the defendant, was good for it, and it should not be *Baldwin's*

loss if the negro girl was not delivered to said plaintiff's intestate; and he further proved, that the said negro girl never was delivered to the said plaintiff's intestate.

The plaintiff prayed the court to instruct the jury:

"That if they should find from the evidence in the cause, that at the time of the contract between the said parties for the sale of the said negro slave, or at any time afterwards, and before the institution of this suit, it was agreed between the said defendant and the plaintiff's intestate, that the sum of one hundred dollars, which had been paid to him, as aforesaid, by the plaintiff's intestate, should be returned or refunded to said plaintiff's intestate, in case the said slave should not be afterwards delivered or put into his possession, and that the said slave was never accordingly delivered to the plaintiff's intestate, that then the plaintiff is entitled to recover; which instruction the court, (Magruder, C. J., and Crain, A. J.,) refused to give; to which opinion of the court the plaintiff excepted.

2nd Exception. On the testimony contained in the aforegoing bill of exceptions, which is referred to and made a part of this bill of exceptions, the defendant prayed the court to instruct the jury, that there was nothing in the said testimony contained, (none other being offered,) from which they could find a verdict for the plaintiff, which instruction the court accordingly gave; to which opinion of the court the plaintiff excepted.

The plaintiff appealed to this court.

The cause was argued before Dorsey, C. J., Spence, Martin and Frick, J.

By Digges for the appellant, and
By T. F. Bowie for the appellee.

Spence, J., delivered the opinion of this court.

Neither of the bills of exceptions in this case, presented to the county court any question for decision upon the pleadings, and, of course, none is presented here. The only questions for our decision arise upon the proof, without reference to the pleadings under which it was offered.

We assume, then, that the plaintiff's declaration is such, as to entitle him to a judgment on the verdict of the jury on any finding in his favor, to which his proof may have shewn him entitled.

Questions of pleading out of view, and assuming, that the testimony in the cause was legally sufficient to have been left to the jury, to find the facts set out in the prayer of the appellant in his first bill of exceptions, should not the court have instructed the jury, that, if they found the facts to be as stated in either alternative of the prayer, that the plaintiff was entitled to recover? Our opinion is, that they should have so instructed them.

If the jury believed the terms of the original contract for the sale of the negro, were correctly stated in the prayer, we are at a loss to imagine, a sound objection to the appellant's right to recover.

But, it is insisted, that conceding the correctness of the first hypothesis of the appellant's prayer, that it would be clearly wrong to grant it upon the second, for the reason, that such an agreement as that stated in the prayer, if made after the first contract for the sale of the negro, would be a *nudum pactum*, for which no consideration was given or received between the parties. Many authorities have been referred to, but, when applied to this case, they fail to convince us of the truth of the principle which they were adduced to establish. Correctly to interpret this latter agreement, and to decide upon its legal validity, it is necessary, first, to ascertain what the agreement was, and what would be its operation upon the rights and interests of the parties. The language of the prayer assumes, and the proof in the cause shews, that it was made in the life-time of the negro, and before the delivery of her, was rendered impracticable. What the terms of this agreement were, its statement in the prayer conclusively shews, as follows: "It was agreed between the said defendant and plaintiff's intestate, that the sum of one hundred dollars, which had been paid to him, as aforesaid, by the plaintiff's intestate, should be returned or refunded to said plaintiff's intestate, in case the said slave should not be afterwards delivered or put into his possession."

If this stipulation formed no part of the original contract between the parties, it cannot be doubted, (but for the objection of its being a *nude pact*,) that, by their subsequently entering into it, the stipulation was incorporated into the original contract, was a modification thereof, and became a part of it, and was as obligatory upon the parties thereto, as if originally a part thereof.

But what would have been the condition of the parties under the original contract, in case the appellee had failed to deliver the negro? the appellant would have been entitled to recover, and the appellee bound to pay, whatever amount of damages resulted to the appellant by reason of such failure. It might have been much more, it might have been much less, than one hundred dollars. What would be the finding of a jury in the case, could not be known.

Under such circumstances, the stipulation or modification of their contract is entered into, by which the appellant, in consideration of the appellees agreeing, (upon the happening of the contingency of non-delivery,) to pay him one hundred dollars certain, and relinquish his, the appellee's, right to be discharged upon the payment of a less sum; that he, the appellant, would agree to accept it, and relinquish his right to claim of the appellee a larger sum, to which his damages might in fact amount, we think the principle of *nudum pactum*, can have no application to such a transaction.

Without intimating any opinion as to the sufficiency in point of fact, of the testimony before the jury, we regard the evidence in the cause as authorising the court to submit to the jury the finding of the facts stated in either alternative of the appellant's prayer.

It follows from what we have said, that the county court erred in refusing to grant the appellant's prayer, contained in his first bill of exceptions, and, consequently, that the court erred in granting the appellee's prayer, contained in the appellant's second bill of exceptions.

Judgment reversed on both bills of exceptions, and procedendo awarded.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

## Jeremiah Townshend and John B. Brooke, Executors of John Townshend, *vs.* William Townshend and others.—*December* 1848.

Caveators who are the assailants of a will, and the actors who originated a petition to prevent its being admitted to probate, their allegations of fact being controverted, are entitled to be placed upon the record in the attitude of plaintiffs, and are therefore entitled to open and conclude the argument before the jury empannelled to try the issues sent from an orphans court to the county court, in relation to such controverted facts.

Upon the trial of issues of fact, designed to impeach the validity of a will, that instrument must be in evidence before the jury, and, if not produced in the county court by the register of wills, the caveators, plaintiffs upon the record, ought to have coerced its production by a *subpœna duces tecum*, directed to that officer.

But where the *factum* of the will was admitted by the pleadings, and assumed by the issues, evidence is unnecessary to establish that conceded fact.

Where the county court, under such circumstances, excludes the evidence of the subscribing witness to establish the conceded *factum* of the will, it is not error.

A witness, the neighbor of a deceased testator, had known him well for twenty-five years, often had dealings with him, and would never have hesitated to buy from, or sell to him, land or negroes for any amount, may prove, that, in his opinion, the testator was of sound and disposing mind, and capable of executing a valid deed or contract, during all the period of the witness's acquaintance with him.

The mere naked opinions of other persons, than the subscribing witnesses to a will, not occupying the position of medical men, are inadmissible in reference to the mental capacity of a testator, whose will may be controverted.

The impression made upon the mind of a witness, by the conduct, manner, bearing, conversation, appearance, and acts of a testator, in various business transactions, is not mere opinion: it is *knowledge*, and strictly analogous to the cases of personal identity and handwriting.

It is an error to suppose, that the maxim, "once insane, is presumed always to be insane," is unqualified in its character, or of universal application.

A continuing insanity is never to be presumed, where the malady or delusion under which the testator labored, was, in its nature, accidental and temporary.

Where there is proof of general rationality, and also of delusion, in a testator, it would be an encroachment on the rights of the jury for the court to assume, that the delusion under which the testator labored, was habitual, and therefore put the onus of proof, that he was free of such delusion at the execution of his will, on the caveatees.

The character of the delusion under which a party labors, as whether temporary or habitual, is within the exclusive province of the jury.

The circumstance, that proof of delusion is all on one side, does not authorise the court to direct the jury, that it proves the fact. The jury have the right to refuse their credit to it.

Where there is testimony in a cause conducing to prove, that a will was the direct consequence of the delusion under which the testator labored; a delusion calculated to pervert his judgment with respect to the disposition of his estate, it is perfectly clear, that he could not be considered as possessing a testamentary capacity, although, upon other subjects, he may have been rational and sane.

APPEAL from *Prince George's* county court.

On the 16th May 1846, the appellants offered for probate the following will:

"In the name of GOD, Amen, I, *John Townshend*, of, &c., being, &c., do make and publish this my last will and testament, that is to say:

"First, and principally, I commit my soul in the hands of ALMIGHTY GOD, and my body to the earth, to be decently buried on the land I bought of *Otho B. Beall*, at the discretion of my executors hereinafter named, and request that no funeral sermon be preached at my burial, but that prayers be read over me by a member of some *Protestant* denomination; and, after my just debts and funeral charges are paid, I give, devise and bequeath as follows, viz:

"I will and direct, that my executors shall pay, provided I do not in my lifetime, to the *British* minister or embassador, accredited at *Washington* city, the sum of eighty-five pounds sterling, being the amount in the aggregate of certain sums of money, which, in and by the last will and testament of my father, *Samuel Townshend*, deceased, are directed to be paid out of his estate to certain persons therein named, being at that time citizens of *London*, in *England*, all of which will more fully appear, reference being had to said last will and testament, now remaining of record in the office of the register of wills of *Prince George's* county: the said amount of eighty-five pounds sterling to be distributed and paid, as far as may be practicable, by the said minister, to and among the persons in the will mentioned, or their legal representatives, according to the sums therein stated, to be due them respectively; and if any of the said persons, or their legal representatives, cannot

be found, the amount payable to them, to be distributed among poor objects of charity in the city of *London* aforesaid. I wish it to be expressly understood, that I do not direct the payment of this money, because of any obligation imposed on me to that effect, but simply because I consider the same to have been honestly due by my father, who desired it to be paid: and my brother *Leonard*, who was the executor of my father, having neglected to pay it, I have thought proper to do so. This direction, however, is by me expressly confined to the principal sum aforesaid, and no interest whatever is to be paid by my executor thereon.

"*Item.*—I give and bequeath to all my negroes or servants, old and young, and their increase, their freedom; and do direct, that my executor hereinafter named, shall, immediately after my demise, procure and deliver to them respectively, from the proper office in said county, such certificates as may be necessary to secure to them their full enjoyment of their freedom; the said certificates, when thus procured, to be paid for by my executor out of my estate. And whereas also, in and by a certain deed of manumission, by me heretofore executed, bearing date the 24th of December 1831, and recorded in, &c., on the 20th March 1832, my said negroes and their increase are to be liberated, manumitted, and set free, from and after the time of my death: and some doubts have been expressed as to the validity of said deed, I have, for remedy thereof, inserted the aforegoing clause herein, and in case the said deed and this, my will, should be insufficient to manumit and free from slavery my said negroes, and their said increase, I hereby give and bequeath them, and their said increase, to my nephew, *Jeremiah Townshend*, and his heirs, not for the use of himself and his heirs, but for the use of the said negroes and their increase, save the amount *of one cent per capita per annum*, which the said slaves, and their said increase, are hereby required to pay forever hereafter to the said *Jeremiah Townshend* and his heirs."

"*Item.*—I give, devise and bequeath, to my said negroes and their said increase, all my property, both real and personal, to be divided amongst them equally, share and share alike, to

them and their heirs, forever. This devise and bequest is to take effect, even if, for any cause at all, at present unforeseen by me, the said negroes, or their said increase, should, after my death, be deprived of their said freedom and held in bondage. And lastly, I do hereby constitute and appoint the said *Jeremiah Townshend* and *John B. Brooke*, executors of this my last will and testament, hereby revoking and annulling all former wills by me heretofore made, declaring this, and none other, to be my last will and testament. In testimony whereof, I have hereunto set my hand and seal, this 17th day of September, in the year of our Lord 1844.

JOHN TOWNSHEND, (Seal.)"

"Signed, sealed, published and declared, as and for his last will and testament, by the said *John Townshend*, the above named testator, in presence of us, who, at his request, in his presence, and in presence of each other, have signed our names as witnesses thereto.

*Phil. Chew*,
*W. B. C. Worthington*,
*James J. Chew*."

On the 8th June 1846, the appellees, brother and nephew of the deceased, filed their petition in the orphans court of *Prince George's* county, representing, that at the date of the said instrument of writing, and for many years before, and ever since, to the time of his death, the said *John Townshend* was continually, and without intermission, in a state of mental derangement and insanity, and utterly incapable of making a valid disposition of his property by last will and testament, by reason of his unsoundness of mind, as aforesaid; and they aver and charge, that the said instrument of writing, purporting as aforesaid, for the cause aforesaid, is utterly null and void, and they therefore enter this, their caveat, against the probate thereof, as and for the last will and testament of the said deceased. That by the said paper, purporting as aforesaid, the said deceased devised and bequeathed nearly all his property, of every kind and description, to his negroes, to the exclusion of all his heirs and next of kin; that for many years prior to his death, and at the time of making the said pretended will,

the deceased was so much under the influence and control of certain opinions and feelings, originating in a morbid and unsound state of mind, in reference to the safety of his soul and his duty in regard to his slaves, as made him a monomaniac on these subjects, (even if he were of sound and disposing mind on other subjects, which these petitioners wholly deny;) and from these peculiar feelings and opinions, excited and operated upon by the acts and fraudulent persuasions of his negroes, or some of them, who had acquired a predominant control and influence over him in all that related to themselves, he was utterly incapable of making a valid will and testament, in regard to the said slaves and his other property; and your petitioners aver and charge, that when the said paper was executed, the said deceased was under the influences aforesaid, which were so overweening and controlling, as to deprive him of the power of resisting them. And so the petitioners aver, that the said pretended will was obtained by the said artful practices and fraudulent persuasions of his negroes, or some of them, at a time, and under circumstances, when his mind was incapable of exercising any free agency, and too feeble to resist their influence, and that for these reasons the same is null and void; and they further, in like manner, enter this, their caveat, against the probate thereof, as and for the last will and testament of the said deceased, &c.

The answer of *John B. Brooke* admitted, that the petitioners are related to *John Townshend*, the deceased; that *J. T.* departed this life in May last; that at the time of his death, he was a very aged man. That on the 17th September 1844, the said *J. T.* made and executed an instrument of writing, as his last will and testament, and which has, since his death, been lodged in the office of the register of wills of *Prince George's* county, for probate, and that this respondent and the said *Jeremiah T.*, were named and appointed as executors thereof; and that the said *John T.*, at the date of the said will, and for many years before, and up to the time of his death, entertained, or at any rate expressed, some very peculiar views on the subject of religion and the scriptures, but, in all other respects, he was, as far as this respondent knew anything of

him, a man of good practical judgment and sense, and, in matters of business, always appeared to possess very considerable acuteness. The respondent is not aware, and does not admit, that the disposition of his property by *J. T.*, was superinduced by, or originated in, a morbid and unsound state of mind, in reference to the safety of his soul, and his duty in regard to his slaves; and this respondent further states, that he has no knowledge of any persuasion or improper influence exercised by the negroes of the said *J. T.*, or any of them, in relation to the execution of the said will.

The answer of *Jeremiah Townshend* reiterated the statements of his co-executor, and also alleged, that he was constrained further to declare, that upon the subject of the disposition of his estate, the said *J. T.* always thought and believed, that he was acting under the immediate agency of the ALMIGHTY, and under the conviction, that he had seen and conversed with GOD face to face, and that he had been told by GOD, to make such a will; this respondent believes he executed said paper. This respondent further declares, that the negro slaves of said *John Townshend* had considerable influence with him, but to what extent said influence was exerted in reference to the execution of said paper, this respondent does not know and cannot state.

Upon this petition and answer, the orphans court directed the following issues, framed by the caveators, to be transmitted to the county court for trial:

1st. Whether the said *John Townshend*, at the time of signing the said paper or instrument of writing, purporting to be his last will and testament, was of sound and disposing mind, and capable of executing a valid deed or contract.

2nd. Whether at the time mentioned in the preceding issue, was the said *John Townshend* urged thereto by the importunities of his negro slave, *Thomas Gantt*, or of any other of his slaves, the devisees in said paper mentioned, or by the importunities of the defendants, or either of them, or any other person or persons whatever, which he was too weak to resist, and under circumstances which left him not free to act in the disposition of his estate.

3rd. Whether the signature of said *John Townshend* to said paper, purporting as aforesaid, was his own free and voluntary act, to which he was induced, with knowledge of its contents and import, and without the exercise of an undue influence, by the slaves aforesaid, or any of them, or by the defendants, or either of them, or by any other person or persons whatever, which, in his then situation, and then imbecility of mind, prevented him from making a disposition of his estate according to his own free will.

4th. Whether the execution of the said paper by the said *John Townshend*, was procured by fraud or by misrepresentation, by the said negro slaves, or any of them, or by the said defendants, or either of them, or by any other person or persons whatever, acting with the privity or by the direction of them, or any of them.

5th. Whether the said paper, purporting as aforesaid, be void, by reason of undue influence, fraudulent devices, importunities, misrepresentations and deceits, practised by the said negro slaves, or any of them, or by the said defendants, or either of them, or by any other person or persons whatever, with them, or either by privity or direction upon the said *John Townshend*, to induce him to execute the said paper.

6th. Whether the said *John Townshend*, at any time subsequent to the execution of said paper, purporting as aforesaid, was desirous of altering the same, and whether he was prevented therefrom by the management, fraud, undue influence, or importunities, of the said negro slaves, or any of them, or of the said defendants, or either of them, or by any other person or persons whatever, by their, or either of their, procurement or direction.

The jury found the first five issues for the caveators, and the sixth for the caveatees.

The *county court* adjudged the record to be transmitted to the *orphans court*, with costs to the caveators.

1st Exception. At the trial of this cause, after the jury had been empannelled, the caveators, by their counsel, claimed of the court the right to open and conclude the argument before the jury, which said right the caveatees, by their counsel, resisted

and claimed, as a matter of right, that the caveatees should open and conclude the argument before the jury. The court, however, were of the opinion, that the caveators had a right to open and conclude the argument before the jury. The caveatees excepted.

2ND EXCEPTION. At the trial of the issues in this cause, after the court had ruled as aforesaid, and after the counsel for the caveators had made his opening statement to the jury, the caveators insisted, it was incumbent on the caveatees to prove the execution of the will, to try the validity of which the issues aforesaid were framed, before they, the caveators, could be obliged to offer any evidence to impeach the validity of said will. The court, (MAGRUDER, C. J., and CRAIN, A. J.,) were of opinion, that the instrument of writing to which the issues relate, must be in evidence to the jury, and the execution of it by the alleged testator, ought to be proved by the caveatees, rather than the caveators, when it is to be read in evidence to the jury; until the paper is before the jury, neither party can properly offer evidence to establish or destroy its validity, and without proof or admission of its execution, a trial of the issues could not well be had; the party objecting to the instrument cannot be required to prove its execution. The practice is for the caveatees to offer some proof of its execution, then its validity is presumed, until it is impeached by the party objecting to it. The caveatees excepted.

3RD EXCEPTION. At the trial of the issues in this cause, the caveatees, to establish the *factum* and execution of the said paper writing in said issues mentioned, proved to the jury, by *James J. Chew*, one of the attesting witnesses, that he attested the execution of said paper, together, and at the same time, with the other attesting witnesses thereto, and in the presence of the said *John Townshend*, who, either before, or after, or at the time of said attestation by said witnesses, acknowledged the same to be his will; that at the time of said attestation, or immediately thereafter, or before the said *John Townshend* entered and partook of a conversation, (the subject matter of which this witness does not recollect,) with the said attesting witnesses, the said caveatee, *Brooke*, and the said *John Towns*

*hend*, at that time, knew what he was engaged in; and that the said *W. B. C. Worthington*, whose name is hereto subscribed as an attesting witness, is deceased; and the general habit of the witness is, when he is called upon to attest a paper, to see that the party signs the paper or acknowledges it, before he, the witness, attests it. That at the time of the execution of the said paper, the said witness was a deputy clerk in the office of one of the attesting witnesses, *Philemon Chew*, then register of wills for this county, and the said will was executed in the office of said register; and the caveatees further proved, by the said *Philemon Chew*, the other attesting witness alive, that he is satisfied, from seeing his name as a witness to said paper in his own handwriting, that he attested the paper, but had no recollection whatever of the circumstances under which it was done. That his (witness's,) memory has been much impaired within the last few years; and the caveatees further offered to prove, by said last named attesting witness, that from his general practice of attesting various papers, such as bonds and wills, and other papers requiring attestation for divers persons, at different periods, that he is satisfied the said paper writing was signed in his presence, and in the presence of the other two attesting witnesses, by the said *John Townshend*, and published and declared by the said *John Townshend* as, and for his last will and testament, in the presence of the said witness, and the other two attesting witnesses; and that witness attested the same in the presence of the said *John Townshend*, at the time of said publishing and declaring, and at his request; which said general practice of the said witness, the counsel for the caveators objected, as being inadmissible; which objection the court sustained, and were of opinion, that the said evidence so proposed to be offered was inadmissible, because it is not to be ascertained in the trial of these issues, whether the will is executed so as to devise real estate. The testimony therefore asked of *Philemon Chew*, even if admissible in a contest between heirs and devisees, (which this court is not called upon to decide,) could not be pertinent to any of the issues now to be tried, especially as proof of the execution of the paper by the alleged testator has been offered and indeed its exe

cution is admitted, and the proof at this stage of the case, is only offered to prove the execution of the paper; to which opinion of the court the caveatees excepted.

4TH EXCEPTION. On the trial of the issues in this cause, the caveatees, to maintain the issues on their part joined, offered to prove by a competent witness, *Joseph B. Hill*, (after he had been sworn, and stated to the jury, that the testator in this cause had been a neighbor of his, and he had known him well for the preceding twenty-five years, and that he had often had dealings with him, and would never, during his acquaintance with him, have hesitated to buy from, and sell to him, land and negroes for any amount that might have been agreed on between them,) that, in his opinion, based upon the foregoing facts detailed by him to the jury, and from his acquaintance, as testified to by him, with the late *John Townshend*, the said *John Townshend* was of sound and disposing mind, and capable of executing a valid deed or contract, during all the period of said witness's acquaintance with him; to which said opinion so proposed to be offered, the caveators objected as inadmissible. The court, (MAGRUDER, C. J.,) sustained the said objection, and refused to permit said testimony, as to his opinion, go to the jury; because, although the subscribing witnesses to a will may express their opinion, touching the sanity or insanity of the alleged testator at the time of executing it, the professional men may likewise, yet other witnesses can only testify as to facts, and, of course, cannot testify their opinion in respect to his sanity or insanity. The books say, the subscribing witnesses may express their opinion; why say so, if all others who may have formed an opinion, are also at liberty to testify that opinion? The witness cannot be brought within any of the exceptions to the general rule, which requires witnesses to state facts, and not give opinions; to which said opinion of the court sustaining said objection, and refusing to permit said testimony to go to the jury, the caveatees excepted.

5TH EXCEPTION. At the trial of this cause, and after the evidence contained in the *third* and *fourth* exceptions, which is to be considered as part of this, had been given, the cavea

tors, to maintain the issues on their part joined, proved to the jury, by a large number of witnesses, that *John Townshend*, at different intervals, from 1816 up to 1842, and during the year 1845, was under the conviction, that he had, at various times, personal sight of, and intercourse and conversation with, the ALMIGHTY. They also proved a variety of facts and circumstances, to show the views of the testator with reference to the Divinity, several sects of christians, and his peculiar notions upon the subject of eternal punishment: the circumstances and command, as he alleged, under which he made his sales of produce, and the introduction of party politics, in conversation and in connexion with his imputed, extraordinary religious sentiments. The supernatural mode in which he supposed himself directed to manumit his negroes, and other evidence tending to show that the deceased labored under a religious delusion, both with respect to his property and negroes.

The caveatees then proved, that for the last thirty years, the said *John Townshend* was very conversant with the scriptures, and quoted them upon all occasions, to enforce the doctrines advanced by him: that he was a man of unimpeachable morality and integrity: fair in all his dealings with his fellow men: was a farmer, and commenced life with a small property of nearly two hundred acres of land, and a very small personal property: that he died at the age of eighty-one years, possessed of a real estate, amounting to thirteen or fourteen hundred acres, and a large stock of negroes, more than fifty in number; that he was a very eccentric man, but, in business matters, he was possessed of considerable shrewdness: he was never known by witness to oppose the prescription of his physician: that he kept accounts at stores, with his physicians, and other individuals, as is the habit of most of persons in the community, and would pay them at the end of the year, either in person, or send the money by one of his servants: that he would consult witness on matters of business, and always spoke rationally, and knew how to take care of his interest. He appeared reverently to believe all the doctrines of the christian religion. That finding, on one occasion, that the doctrines promulgated by him were deemed more heavily than usual, and, in some measure

giving to those young men with whom he was acquainted, immunity to sin; he then told every body better, and that all men would not be saved; that most of his wild and eccentric conversations were for talk sake, as witness judged from the manner of deceased at the time of the conversations; that deceased was very fond of religious controversy, and would laugh heartily in these controversies; in his last sickness, he was aware of his approaching end, and was very composed, and said he would die. That his disease was dropsy in the chest, and the symptoms are choking and shortness of breath; that he considered he was impelled, by a high sense of religious obligation, and a conscientious discharge of his duty; and the family physician of deceased proved, that, in his opinion, was of sufficient sense and judgment to execute a will or deed, disposing of either real or personal estate, and that in matters of business, deceased was shrewd and astute. They further proved the extent, nature and character, of many transactions of business in which he had been concerned, and his rationality therein.

The caveatees, by their counsel, after the testimony by the witnesses for both sides had been detailed, all of which is contained in this and the preceding exceptions, which are hereby made and considered as a part of this exception, prayed the court to instruct the jury:

1st. That if they find from the evidence aforesaid, that at the time of executing and acknowledging the paper propounded for probate in this cause, the said *John Townshend* was of sound and disposing mind, and capable of executing a valid deed or contract, then the said *John Townshend* had a sufficient testamentary capacity.

2nd. If the jury shall find from the evidence aforesaid, that the said *J. T.*, at the time he executed the paper propounded for probate, was under no other delusion, than that of believing that the ALMIGHTY specially revealed himself, by manifesting his supreme will to him in regard to all matters of business of importance occurring to said *Townshend*, and that he was bound implicitly to obey said revelations of the will of the ALMIGHTY GOD, and if they further find from the evidence, that

in other matters, while acting under said delusion, he acted rationally, and as a man of sound and disposing mind, and one capable of making a valid deed or contract, then the said alleged delusion is not of itself sufficient to avoid said will.

3rd. If the jury shall find from the evidence aforesaid, that the alleged delusion, (if any,) under which the said *J. T.* was acting, at the time of executing the paper propounded as his last will and testament, did extend to the other acts of said *T.*; and if they further find, that said delusion, although existing in the same degree, did not prevent the said *T.* from acting, at the time of said other acts, as a man of sound and disposing mind, and capable of executing a valid deed or contract, would act, then it is competent for the jury to find, that said *T.* was of sound and disposing mind, and capable of executing a valid contract, at the time of executing said paper so propounded, notwithstanding they may believe he was, at the time of executing said paper, acting under said alleged delusion.

And thereupon the caveators prayed the court to instruct the jury:

1st. That if they find in the execution of the will in this cause, the said *J. T.* acted under mental delusion, with reference to the disposition of the property therein devised, then they must find for the caveators.

2nd. The caveators further prayed the court to instruct the jury, that if they find from the evidence, that prior to the execution of the will, the said *John Townshend* labored under delusion, as to the disposition of the property therein devised, then it is incumbent upon the caveatees to prove his freedom from said delusion, at the period of the execution of said will.

The court granted the *first* prayer of the caveatees, and the *first* prayer of the caveators, without objection of counsel on either side, and refused to grant the *second* and *third* prayers of the caveatees, and granted the *second* prayer of the caveators.

The court refused to grant the *second* and *third* instructions asked for by the caveatees, and for the following other reasons: they are calculated to mislead the jury, inducing them to believe, that in judging of the testamentary capacity of the

deceased, they might exclude from their consideration the other facts and circumstances in proof, and which are to be taken in consideration with the matter in evidence, upon which the prayer is grounded; the unreasonable provision of the will, and all the facts and circumstances in proof, tending to show the incapacity of the deceased to make a disposition of the estate, with judgment and understanding with reference to the amount and situation of his estate, and the relative claims of the different persons who should have been the objects of his bounty. The court is not to ascertain the value of each portion of the testimony, but all of it going to show capacity or incapacity, at the time of making the will, is to be considered by the jury, who are to decide the question of sanity, and from the whole testimony the jury are to determine, whether the deceased, at the time of executing the will, was of sound and disposing mind, and capable of executing a valid deed or contract. The whole of the testimony, except so much as the exceptions state, was objected to, having gone to the jury without objection; and the purpose for which any portion of it, (unless when otherwise mentioned,) not being stated, or required to be stated, the second prayer of the caveators is granted, because, although the presumption of law is, that every testator was, at the time of executing the instrument, of sound, disposing mind, and capable of making a valid deed or contract, and the burden of proof lies upon those who assert the mind to have been unsound; yet if a previous state of insanity has been established to the satisfaction of the jury, then the onus is upon the party who would establish the will.

The court expresses no opinion touching the value or weight of any part, or of the whole of the testimony, which has gone to the jury, they being the exclusive judges thereof. To which said refusal to grant the said second and third prayers of the caveatees, and the granting of the said second prayer of the caveators, the caveatees excepted.

The caveatees appealed to this court.

The cause was argued before Dorsey, C. J., Martin and Frick, J.

By ALEXANDER and DIGGES for the appellants, and
By W. H. TUCK and T. F. BOWIE for the appellees.

MARTIN, J., delivered the opinion of this court.

It appears from the record in this case, that at the trial of the cause in the county court, after the jury had been impannelled, the appellees, as the caveators of the will in controversy, claimed the privilege of opening and concluding the argument before the jury. This claim was resisted by the appellants, who maintained, that they were entitled, as the caveatees of the will, to begin and conclude the argument, upon these issues. The court below decided in favor of the position taken by the caveators, and whether they erred in the opinion thus expressed by them, is the question raised for our consideration, by the *first* bill of exceptions.

It appears from the proceedings, as exhibited by the record, in this case, that on the 16th of May 1846, the instrument of writing of the 17th of September 1844, purporting to be the last will and testament of *John Townshend*, was propounded for probate in the orphans court of *Prince George's* county, by the appellants, as executors; that on the 8th of June, in the same year, the caveat and petition of the appellees was interposed, in which they aver and charge, that the pretended will was invalid, upon the two-fold ground, that the testator was, at the period of its execution, mentally incapable of making a valid deed or contract, and that the paper purporting to be his will, was procured from him by fraud or undue influence; and, in their petition, they prayed, that, for the purpose of trying the validity of the said pretended last will and testament, issues might be transmitted to *Prince George's* county court, involving the objections presented by the caveat.

The appellants appeared in the orphans court on the 20th of October 1846; one of them, *John B. Brooke*, in his answer to the petition of the appellees, distinctly denies the allegations of the caveat, with respect both to incapacity and fraud, or undue influence, as therein contained, and the issues in dispute, and transmitted to the county court for the determination of a jury, are predicated on an affirmation of facts, introduced

for the purpose of impeaching the will by the caveators on the one side, and a negation of those facts by the caveatee in his answer. And it appears to us to be perfectly clear, that in a case thus situated, the caveators are to be regarded as the assailants of the will; as the *actors* who originated this proceeding, and who were therefore entitled to be placed upon the record in the attitude of plaintiffs. And, assuming this to be the true position of the caveators, it results from the decision of the Court of Appeals, in the case of *Kearney against Gough*, 5 *Gill & John.*, 457, that they possessed the right to open and close the argument before the jury.

In that case, an action was instituted against the defendant, for a libel on the plaintiff's wife. The defendant pleaded a justification as to a part of the libel, and contended at the trial, that inasmuch as he had justified the language charged to him in the declaration, the affirmative of the issue was upon him, and that he had the right to open and conclude the argument. But the court below refused the application, and the Court of Appeals, in concurring with this opinion, say:

"The decision is in conformity with the settled practice throughout the State, giving to the *plaintiff on the record* the opening and conclusion, except in cases of avowry for rent in arrear, in relation to which the practice is not uniform."

The ruling of the court below upon the point presented in this exception, was, therefore, we think, correct; and we proceed to consider the questions raised for our examination, by the *second* bill of exceptions.

We are informed by this exception, that after the counsel for the caveators had made his opening speech before the jury, the caveators insisted, that upon the issues which the jury were sworn to try, it was incumbent on the caveatees to prove the execution of the will, to try the validity of which the issues were framed, before the caveators could be obliged to offer any evidence to impeach its validity; and that this application was granted by the court below, who held:

"That the instrument of writing to which the several issues relate, must be in evidence to the jury, and the execution of it by the alleged testator, ought to be proved by the caveatees

rather than the caveators, when it is to be read in evidence to the jury."

We cannot concur with the ruling of the county court as disclosed to us by this exception. The *factum* of the will was admitted, and indeed assumed by the issues in the cause, and the introduction of evidence to establish a conceded fact, was an act of supererogation, and therefore to be treated as irrelevant and inadmissible. The court was certainly correct in declaring, that it was indispensably necessary to place before the jury the instrument of writing, in reference to which the issues were framed; but if the will was not produced in court by the register of wills, to whose custody it had been confided, it was the duty of the caveators, who were the plaintiffs upon the record, and entitled to open the cause, to have coerced its production by a *subpœna duces tecum*, directed to that officer. A *subpœna* of this character, would have been ordered by the court, on the application of the caveators.

It follows from the views we have thus presented, with respect to the questions suggested by the second exception, that the evidence introduced, and proposed to be adduced, by the caveatees in the *third* exception, was entirely irrelevant and inadmissible. It was proposed to prove, by the testimony of the attesting witnesses, the *factum* of a paper, the execution of which was admitted by the pleadings and issues in the cause. This could not be done; and the act of the court below, in excluding evidence, the aim and object of which was to establish the execution of a will in this condition, cannot be complained of as error, because, according to the law of the case, as now enunciated, the testimony proposed to be offered by the appellants, would be considered, in legal contemplation, as in all respects, incompetent. The ruling of the court, as expressed in this bill of exceptions, must therefore be affirmed; but whether the law announced by the court below, with regard to the point intended to be reserved by that exception, assuming, that it was incumbent on the appellees to have proved affirmatively the *factum* of the will, be correct or not, has become an abstract question, upon which it is not proper for this court to express an opinion.

It appears from the *fourth* exception, that the caveatees produced a witness, who proved, that he had been a neighbor of the testator, and had known him well for twenty-five years; that he had often had dealings with him, and would never, during his acquaintance with him, have hesitated to buy from him, or sell to him, land and negroes, for any amount that might have been agreed on between them. This evidence was admitted without objection. The caveatees then offered to prove by the witness, that, in his opinion, based on the foregoing facts, and from his acquaintance with the testator, the testator was of sound and disposing mind, and capable of executing a valid deed or contract, during all the period of the witness's acquaintance with him. The court, on objection interposed by the caveators, refused to permit the witness to express his opinion with respect to the capacity of the testator. An exception was taken to this ruling of the court, and the counsel for the appellants have insisted, that after the witness had proved, that he was for a series of years in the habit of frequent intercourse with the testator, in the way of business, and in the interchange of friendly offices, he might be required to express his opinion, based on such observation and facts, in relation to the capacity of the testator.

The proposition advanced by the counsel for the appellants, is unquestionably correct, and the court below erred, we think, in the opinion expressed by them in this exception.

It is stated by the elementary writers upon this subject, that the attesting witnesses are considered in the law as placed round the testator, to protect him against fraud in the execution of his will, and to judge of his capacity; that the testator is intrusted to their care; and it is their duty to inform themselves of his capacity, before they attest his will; and it is on this ground, that these witnesses are permitted to testify as to the opinions they formed of the testator's capacity, at the time of executing his will. And it is equally true, as a general proposition, that the mere naked opinions of other persons, not occupying the position of medical men, are inadmissible in reference to the mental capacity of a testator, whose will may be controverted.

But the testimony proposed to be submitted by the caveatees, to the jury as illustrative of the mental condition of the testator, was not the mere naked, isolated, unsupported opinion of the witness. The impression made upon the mind of the witness by the conduct, manner, bearing, conversation, appearance, and acts of the testator in various business transactions, for a long series of years, is not mere opinion, it is *knowledge*, and strictly analogous to the cases of personal identity, and handwriting, which are constantly established in the law courts, by the opinion and judgment of persons who have enjoyed the opportunity of observing the person, or handwriting sought to be identified, or proved. *Mr. Greenleaf*, in his *Treatise on Evidence*, says:

"It is the constant practice to receive in evidence, any witness's belief of the identity of a person; or, that the handwriting in question is, or is not, the handwriting of a particular individual: provided he has any knowledge of the person, or the handwriting." 1 *Greenlf. Ev.*, *sec.* 440.

In the case of *Clary against Clary*, 1 *Iredell*, 83, the late *Judge Gaston*, in delivering the opinion of the *Supreme Court of North Carolina*, upon a subject similar to the one now under consideration, says:

"The judgment, founded on actual observation of the capacity, disposition, character, temper, peculiarities of habit, form, features, or handwriting of others, is not mere opinion: it approaches to knowledge, and is knowledge, so far as the imperfection of human nature will permit knowledge of those things to be acquired; and the result thus acquired, should be communicated to the jury, because they have not had the opportunities of personal observation; and because, in no other way can they effectually have the benefit of the knowledge, gained by the observation of others."

In the case of *Grant vs. Thompson*, 4 *Con. Rep.*, 203, the *Supreme Court of Connecticut* held, that though the mere opinions of witnesses relative to the sanity of a party, are not admissible, yet their opinions, in connection with the facts on which they are founded, are admissible. The court said:

"The county court rejected the mere opinions of witnesses, relative to the defendant's insanity, but admitted them in connection with the facts on which they were founded; and in doing this, they discriminated soundly and legally. This is not a novelty, but sanctioned by the usual practice of courts, in such cases." They say: "Although it would be dangerous in its tendency to admit the uncorroborated opinion of a witness, relative to the operations of another's mind, yet, when it is found to be presumptively supported by facts, it carries with it a convincing weight. The best testimony the nature of the case admits of, ought to be adduced; and on the subject of insanity, it consists in the representation of facts, and of the impressions which they made."

The same doctrine was maintained in a strong opinion, delivered by judge *Duncan* in *Rambler vs. Tryon*, 7 *Sargt. & Rawles' Rep.*, 92; and in *Morse vs. Crawford*, 17 *Verm. Rep.* 502. The court declared, "that the law was well settled, and especially in that State, that a witness may give his opinion in evidence, in connection with the facts upon which it is founded, and as derived from them; though he could not be allowed to give his opinion, founded upon facts proved by other witnesses."

So in *Swinburn on Wills*, 72, 2 *Stark. Ev.*, 1279, *(n.)* it is said: "It is not sufficient for a witness to depose, that a testator was mad, or beside his wits, unless a sufficient cause can be given to prove this deposition: as that, he saw him do such acts, or heard him speak such words, as a person having reason would not have done or spoken." Thus discriminating between mere abstract opinion, and opinion predicated upon, and fortified by facts, within the personal observation of the witness.

In the celebrated case of *Wright against Tatham*, 5 *Clark & Fin.*, 670, it was held by the *House of Lords*, that letters written by third persons, since deceased, to a party whose will was disputed, and found among his papers, are not admissible evidence of his competency, without some proof that he, himself, *acted upon them;* but it will be found, by an examination of the elaborate opinions, pronounced *seriatim* in this cause, that though the mere naked opinions of witnesses, would not have

been considered as admissible, with respect to the capacity of a testator, yet such opinions would become evidence in connection with the facts upon which they were founded.

Upon this subject *Alderson*, *Baron*, said: "The object of laying such testimony before the jury, is to place the whole life and conduct of the testator, if possible, before them, so that they may judge of his capacity; for this purpose you call persons who have known him for years, who have seen him frequently, who have conversed with him, or corresponded with him.

"After having thus ascertained their means of knowledge, the question is generally put, as to their opinion of his capacity. I conceive this question really means to involve an inquiry, as to the *effect* of all the acts which the witnesses had seen the testator do for a long series of years, and the manner in which he was, during that period, treated by those with whom he was living in familiar intercourse. This is not properly opinion, like that of *experts*, but is rather a compendious mode of putting one, instead of a multitude of questions to the witness under examination, as to the acts and conduct of the testator."

We think, therefore, that the caveatees were entitled to the opinion of this witness, with respect to the capacity of the testator, in connection with the facts upon which it was founded, and that the county court were wrong in rejecting this testimony. This question does not appear to have been heretofore directly adjudicated by this court, although the implication from the opinion in the case of *Brooke vs. Berry*, 2 *Gill*, 98, is, that evidence of this character would have been regarded as admissible.

It appears from the *fifth* exception, that after the parties had offered in evidence a variety of proof, touching the mental capacity of the testator, and his competency to make a valid will, the caveators asked from the court two instructions, and the caveatees prayed the court to grant three instructions to the jury. The court granted, by consent, the *first* prayer of the caveators, and the *first* prayer of the caveatees; and also granted the second prayer of the caveators, and rejected the second and third prayers of the caveatees.

The second prayer of the caveators, is in the following words: "That if the jury find from the evidence, that prior to the execution of the said will, the said testator labored under delusion as to the disposition of the property therein devised, then it is incumbent on the caveatees to prove his freedom from such delusion, at the period of the execution of the will."

The counsel for the appellees, in maintaining the correctness of this instruction, have relied upon the principle, "that as the law presumes every one to be sane until the contrary is proved, it is on the other hand to be presumed, that a man's mind remains unchanged; and when, therefore, lunacy or delusion has been once established, it is incumbent on him who alleges the validity of the act, to prove that it was done at a lucid interval." *Semel furibundus, semper furibundus presumitur.* 2 *Stark. Ev.*, 1276.

It is an error however to suppose, that the maxim: "Once insane, presumed to be always insane," is unqualified in its character, or is of universal application. An examination of the authorities will show, that a continuing insanity is never to be presumed, where the malady or delusion under which the testator labored, was in its nature accidental and temporary.

In the case of *Hix against Whittimore*, 1 *Medf. Rep.*, 547, the court say: "There must be kept in view, the distinction between the inferences to be drawn from proof of an habitual or apparently confirmed insanity, and that which may be only temporary. The existence of the former, once established, would require proof from the other party, to show a restoration or recovery; and in the absence of such evidence, insanity would be presumed to continue. But if the proof only shows a case of insanity, connected with some violent disease, with which the individual is attacked, the party alleging the insanity, must bring his proof of continued insanity, to that point of time which bears directly upon the subject in controversy: and not content himself, merely, with proof of insanity at an earlier period."

In *Cartwright vs. Cartwright*, 1 *Phillim. Rep.* 100, it was held, "that where *habitual* insanity in the mind of a person is established, that the party who would take advantage of an

interval of reason must prove it;" recognising the distinction between habitual and temporary delusion, with respect to this doctrine of presumption.

By referring to the language of this prayer, it will be seen, that the court instructed the jury, that if they believed from the evidence, that prior to the execution of the will, the testator labored under delusion as to the disposition of his property, it was incumbent on the caveatees to prove that he was liberated from such delusion at the period of the execution of his will; thus assuming that the delusion under which the testator labored was habitual in its character.

This the court could not do, without encroaching upon the rights of the jury.

It is no answer to this view of the instruction granted by the court, to say, that the evidence presented a clear case of habitual delusion, and showed that the morbid image of which this testator had become the victim accompanied him through the greater portion of his life. Still, the character of the delusion was a question within the exclusive province of the jury, and the court erred in assuming as a fact, that it was permanent or habitual.

The case of the *Charleston Insurance Company vs. Corner*, 2 *Gill*, 426, is conclusive upon this point. In that case, the court said.

"The jury doubtless would have found these facts according to the testimony, but the sufficiency of evidence to satisfy a jury, or the circumstance, that it is all on one side, does not authorise the court to direct the jury, that it proves the fact. They have the power to refuse their credit, and no action of the court should control the exercise of their admitted right, to weigh the credibility of evidence."

We have no hesitation in declaring, that the court were correct in rejecting the second and third prayers of the caveatees.

There certainly was testimony in the cause, conducing to prove, that the paper in controversy, was the direct consequence and offspring of the delusion under which this testator labored; a delusion calculated to pervert his judgment and to control his will, with respect to the disposition of his estate: and assum

ing this to be true, it is perfectly clear, that he could not be considered as possessing testamentary capacity, although, upon other subjects, he may have been rational and sane.

In *Shelford on Lunacy*, 296, it is said: "Proof of the existence of partial insanity will invalidate contracts generally, and will be sufficient to defeat a will, the direct offspring of that partial insanity, both in the courts of common law, and in the ecclesiastical courts; although the testator, at the time of making it, was sane in other respects, upon ordinary subjects."

We think the court were correct in the opinion expressed by them in the *first* exception, and in rejecting the *second* and *third* prayers of the appellants, as exhibited in the *fifth* exception. We also affirm the judgment of the court in the *third* exception.

But we think that they erred in the opinion expressed by them in the *second* and *fourth* exceptions; and in granting the *second* prayer of the appellees, in the *fifth* exception.

The judgment of the county court is therefore reversed, and a *procedendo* will be awarded. For although the jury rendered a verdict in favor of the caveators, upon the issues involving the questions of fraud and undue influence, it is impossible to affirm that a different result might not have been produced, if there had been no error in the rulings of the court below, with respect to the capacity of the testator.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

E. R. Wheeler and others, *vs.* The State, use of Adm'rs of Aquila Bateman.—*December* 1848.

In an action of debt, an appeal will not lie from a judgment on a demurrer, without waiting for the final judgment, after ascertainment of damages, upon a replication assigning breaches of the condition of a bond declared upon.

Appeal from *Charles* county court.

This was an action of *debt*, brought on the 30th June 1846, by the appellee against the appellant.

The defendants pleaded to the plaintiff's declaration, and he rejoined, assigning breaches of the condition of the bond declared on. The defendants then demurred generally, in which the plaintiff joined. The county court adjudged the replication of the plaintiff, good and sufficient in law to maintain the action, from which the defendants appealed to this court.

The cause was argued before DORSEY, C. J., MARTIN and FRICK, J.

By REEDER for the appellants.

DORSEY, J., delivered the opinion of this court.

The appeal in this case must be dismissed, as prematurely taken. Instead of waiting until the inquisition was taken, and a final judgment rendered in the cause, the appellants appealed from the interlocutory judgment of the county court overruling their demurrer. From the final judgment in the cause, no appeal has been prayed.

APPEAL DISMISSED WITH COSTS.

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MICHAEL B. CARROLL, EXECUTOR OF W. B. C. WORTHINGTON, *vs.* ROBERT W. BOWIE.—*December* 1848.

Upon an appeal to the December term of this court 1847, errors were assigned, and a rule argument entered at June term 1848, the next succeeding term. The cause was set down for trial at December term 1848, when, at the call of the cause, the counsel of the appellee appeared, and suggested the death of his client, in January 1848. HELD, that the cause did not abate.

At common law, if the *plaintiff in error* dies after errors assigned, it does not abate the writ; and a writ of error does in no case abate by the death of the *defendant in error*, whether it happen before or after errors assigned.

The act of 1806, ch. 90, sec. 11, has no application to the case of the death of the defendant in error. It relates only to deaths *after* rule argument laid.

The act of 1815, ch. 149, sec. 6, declares, that in all appeals or writs of error, the same shall not abate by the death of either party, if the proper person necessary to be made party shall, at the first or second term succeeding the death, appear for the purpose of prosecuting or defending the same.

But it is not to be inferred, that the heir, &c., or other proper person to be made a party, if a defendant, may elect to suffer a cause to abate, and so deprive the other party of the fruits of his judgment. Such a construction of the act of 1815, would constructively repeal the act of 1806.

The acts of 1806, ch. 90, sec. 11, and 1845, ch. 149, sec. 6, should be construed together; the former is confined to cases of death after rule argument, which points to the third term of the court, while the latter designs to extend the death to all prior stages in the cause, if the party proper to be made accepts the privilege conferred by that act.

The object of the act of 1815, was to prevent the abatement of appeals in certain cases, and intended that the party interested in sustaining the judgment of the court below, should have the privilege of appearing to prosecute or defend here.

The act of 1815, is to be confined to such cases as did abate by the death of the party before that act was passed.

The case of *Owings vs. Owings*, 3 *Gill & John.*, 1, explained and confirmed.

At common law, where one joint obligor has satisfied the bond, his remedy against his co-obligors is in *assumpsit* for contribution.

In such a case, payment by one, works a satisfaction of the bond; and the only remedy is, to recover back from *the other sureties* in the bond, their proportion of the payment; or, from the principal the whole amount.

The possession by an obligor of a bond, a surety in the bond, creates a presumption in law that it has been paid.

By the 7th sec. of the act of 1763, ch. 23, where any person is bound in a bond or obligation, which shall be unpaid by the principal debtor, and the money due be paid or tendered by the surety, the obligee shall assign such bond to the surety, and he may, by virtue of the assignment, have an action in his own name against the principal debtor, but this section gives no remedy against a co-surety.

Neither does the 9th section of that act, give any remedy to one co-surety against another. It does no more than to supersede the common law, and give to the assignee, as the holder of a bond of third parties, the right to sue in his own name, the principal debtor; not to affect pre-existing rules between co-sureties.

If a principal obligor, and a surety, be sued on the bond by a co-surety, who claims as assignee from the obligee, he can recover but one-half from the co-security, while he claims the whole sum from the obligor. Such an incongruity cannot subsist at law.

The act of 1829, ch. 51, which authorises an assignee of a bond to sue in his own name, does not apply to the relation of co-sureties. It was not intended any more than the act of 1763, to affect questions which depend upon principles of contribution.

APPEAL from *Prince George's* county court.

This was an action of *debt*, brought on the 21st March 1846, by the appellant against the appellee, on the joint and several

bond of *William B. Chew*, *W. B. C. Worthington*, and *Robert W. Bowie*, with condition, that *W. B. Chew* would pay *Edward Eversfield* $1000, with interest, on or before 1st June 1843. The bond was assigned, under seal, by *E. E.* to *W. B. C. W.*, one of the securities, for value of him received, on the 14th August 1841. The declaration of the plaintiff set forth the bond and condition, the assignment by *E. E.* to his testator in writing, before the payment of the $1000; the delivery of the bond to such testator, of which assignment and delivery the defendant had notice, and so became bound to pay the sum demanded in the nar, $500, and non-payment.

The defendant demurred generally to the declaration, in which the plaintiff joined. The county court gave judgment for the defendant, when the plaintiff prosecuted this appeal.

The cause was decided in the county court at November term 1847, and the appeal taken to December term 1847 of this court. In this court, on the 9th December 1848, the death of the appellee was suggested, as having occurred in the month of January 1848, and before the cause was under "rule argument," for which reason it was alleged that the appeal had abated.

The cause was argued before Dorsey, C. J., Spence, Martin and Frick, J.

By T. F. Bowie for the appellant, and
By W. H. Tuck for the appellee.

Frick, J., delivered the opinion of this court.

In this case, the appellant's testator, *Walter B. C. Worthington*, and *Robert W. Bowie*, the appellee, became sureties for *Wm. B. Chew*, in a bond to *Edward Eversfield*, conditioned for the payment of $1000. *Worthington*, afterwards, purchased or paid off the bond, and took from *Eversfield* an assignment thereof, in the following words:

"For value received, I hereby assign the above note to *W. B. C. Worthington*, one of the securities aforesaid, his heirs and assigns. Witness my hand and seal, this fourteenth day of August 1844."

The writ was issued on the 21st day of March 1846, in the name of *Michael B. Carroll*, executor of *W. B. C. Worthington*, against *R. W. Bowie* alone. The writ counts in debt on the bond for $2000. The declaration sets out the bond, the condition and the assignment, and demands $500 of the defendant, being one-half the debt originally due. The defendant entered a general demurrer. The plaintiff joined in demurrer, and the court below gave judgment for defendant.

It is contended before us, by the counsel for the appellant, that the court below erred in sustaining the demurrer:—because the declaration sets forth a good cause of action;—and the bond declared upon being a joint and several bond, the plaintiff's testator, although one of the co-obligors, as surety for the principal obligor, had a right to take an assignment of said bond from the obligee, and such assignment gave him the right of action upon the bond, against his co-surety, in his own name.

Before proceeding to announce our opinion on the validity of these objections to the judgment below, a preliminary question arises upon a suggestion at bar, of the death of the appellee upon the record.

The appeal was brought to the December term of this court 1847. After errors assigned, and a "rule argument" entered at June term 1848, the case was set down for trial, at this December term 1848. At the call of the case for trial, the counsel on the record for the appellee voluntarily comes into court, and makes suggestion in writing of the death of the appellee, in January 1848. Thus, then, the death occurred before errors assigned, and is suggested after the rule argument, and is precisely within the terms of *Roach vs. Johnson*, reported in *2 H. & J.*, 37, *(note a,)* where the court decided, that a writ of error or appeal, did not abate by the death of either party, if the case was standing under rule argument before the death is suggested. And this is in strict conformity to the common law, as laid down in *Tidd's Practice*, 1163, *9th ed.*: "If a plaintiff in error dies, before errors assigned, the writ abates, and the defendant may thereupon sue out a *scire facias, quare executionem non*, to revive the judgment against the executors or administrators of plaintiff in error."

"If plaintiff in error dies, after error assigned, it does not abate the writ."

"And a writ of error does in no case abate by the death of the defendant in error, whether it happen before, or after error assigned." This doctrine is recognised in 2 *Williams' Ex'trs*, 1234, and in *Green vs. Watkins*, 6 *Wheat.*, 262.

But it is said, the acts of Assembly, of 1806, ch. 90, sec. 11, and 1815, ch. 149, sec. 6, qualify and control this doctrine, and, if so, this court is bound by them. To the case under consideration, the former act has no application, the words of that act being, "in case one of the parties shall *die*, *after* rule argument, the cause shall not abate," referring to the time of the death, and not the date of the suggestion. And here, the party having died *before* the case was under the rule, it is, of course, not within its provisions. The act of 1815, has a more direct application to the case before us, if it can be construed to come within the scope and intention of that act. It provides, "that in all appeals or writs of error depending in the Court of Appeals, the same shall not abate by the death of either party, if the proper person necessary to be made party, shall, at the first or second term succeeding the death, appear for the purpose of prosecuting or defending the same."

Hence it is inferred, that the heir, devisee, executor, administrator, or other proper person, to be made the party, if a defendant may elect to suffer the cause to abate, to the detriment of the other party, and in direct violation of every principle of justice, deprive him of the fruits of a judgment righteously obtained in the court below.

At first view, the peculiar texture of the paragraph, would seem to warrant the construction contended for, and thus, in the event of the death of a party, operate to defeat the appeal in every case, where his representatives may find it their interest to do so, and that *at any and every stage of the appeal.* If constructively under this act, every case abates where the proper representative declines to appear, and has the first and second term after the death to appear or not at his option, does it not constructively also repeal the act of 1806? That act provides, the case shall not abate, if the party *die after* rule argument;

and yet, by the act of 1815, die when he may, the option extends to the second term succeeding the death, and that may happen, in the course of things, as well *after* as before the rule argument. This conclusion from the premises is clear; as clear as it is to the court, that if it was intended to repeal the act of 1806, it would have been done in express terms. On the contrary, it is a more just and reasonable construction to suppose, the legislature intended both acts to stand together; the act of 1806, being confined only to cases of death after rule argument, (which points to the third term of the court,) while the act of 1815, designs to extend it to all the prior stages in the cause, if the party accepts the privilege conferred by the act.

Independent of that act, it is admitted, the case does not abate, and if the present object of the appellee is to be attained under the act, it must be constructively. In sustaining such construction, we need not look far before us, to perceive the manifest injustice the rule must work upon the suitors in this court. But such legislation, by implication, cannot be supposed to have been in the view of the legislature. Whatever the form of construction and phraseology of the law of 1815, nothing more could have been intended, than that the party interested in sustaining the judgment below, should have the privilege of appearing to prosecute or defend it here, to prevent the abatement of the suit. Not, that by declining to appear, he shall have the advantage of defeating the object of the appeal.

We have seen, that at common law, in certain cases, the suit did abate by the death of a party. In other cases it did not abate, as in the case before us. The object of the act of 1815, therefore, was manifestly on its face, conceived to prevent abatements. It is no forced construction to say, it was a provision for the first class of cases, such as did abate, and not designed to effect an abatement of such, as did not abate before the act. They cannot have intended to say this, and no conceivable reason in policy and justice can be urged in support of it. No object can be imagined for legislating upon any other class of cases, than such as were before unprovided for;

that is, such as would have abated at the time the act was passed. The whole scope of the enactment, from its obvious import, when rightly construed, was to *prevent* the abatement of suits, not to legislate them out of court constructively.

In the absence of all positive averment, we cannot assume, that, by implication, the legislature designed to legalize such obvious injustice, and to convert what is ostensibly a boon and a privilege, into an instrument of wrong and oppression.

The court are the more encouraged in sustaining this view of the act of 1815, because it may be made to stand consistent with the act of 1806. Whereas, by the construction contended for, that, by implication, every suit in this court abates by the death of a party, if the representative declines to come in at the first or second term after the death, we decide, in the same implication, the repeal of the act of 1806, and a repeal of the decision in *Roach vs. Johnson*, which it is the purpose of this court to sustain, conceiving, by the views here taken, that that case and both acts of Assembly may stand consistently together.

In coming to this conclusion, upon the construction of the acts before us, it may be proper to remark, that we have not overlooked the case of *Owings vs. Owings*, in 3 *G. & J.*, 1, where the court would seem to have given a different construction to the sixth section of the act of 1815. Where that section provides, that no action shall abate, if the heir, executor, &c., shall appear; the court there say, that "the necessary corollary is, that the appeal or writ of error will in such case abate, if the heir, executor, &c., shall not appear." This, however, as before argued, must be construed to mean, such cases as *did abate by the death of the party before the provisions of the act*, and to this class of cases, the whole act must be taken to refer. At common law, if the plaintiff in error died before errors assigned, the writ abated, and for this case the legislature provided in the fifth section of 1815. And to cover all other possible cases where the appeal would abate by a death, the subsequent section was added, to enable the party to sustain the case in the Court of Appeals: that is, *such a case as necessarily abated before the interposition of the act*. And in all such cases, if any remain unprovided for, it is still the "neces

sary corollary," that the appeal will abate, if the party interested fails to avail himself of the privilege conferred by the act. And such must be construed to be the meaning of the court in the case of *Owings vs. Owings*, where the party actually died *before appeal taken;* and the language of the act being, "in all cases *depending* in the Court of Appeals," the construction of the acts of Assembly was there out of the question, and the case abated at common law.

We now proceed to the right of the party to recover in this form of action. At common law it is admitted, that where one joint obligor has satisfied the bond, his remedy against his co-obligors is in assumpsit for contribution. For, in such case, the payment by one, works a satisfaction of the bond, and the only remedy is, to recover back from the other sureties in the bond their proportion of the payment, or from the principal the whole amount. The very action of the co-obligor proceeds upon the *concessum*, that he has paid the bond. His possession, out of the hands of the obligee, is a presumption in law, that it has been paid. *2nd Greenleaf, sec.* 527. And the action in this case, and the declaration, proceed upon the averment, that the bond was assigned by the obligee to the appellant, and, of course, that he has paid it, and being so paid by him as an obligor, it is extinguished forever as an obligation, and all right of action upon it at common law is gone.

Such being then the position at common law, is the case of the appellant aided by the act of 1763, ch. 23, which he has invoked to the support of the action in this form? By the 7th section of that act, where any person is bound in a bond or obligation, which shall be unpaid by the principal debtor, and the money be paid or tendered by the surety, the obligee shall be bound to assign such bond to the surety, and he may, by virtue of the assignment, have an action in his own name, against the principal debtor, notwithstanding any law or usage to the contrary. Whatever right this section may furnish against *Chew*, the principal debtor, it so far gives no remedy to the appellant against his co-surety, *Bowie*

And the 9th section, on which the appellant principally relies, is equally unavailing to sustain this action. For, although "upon all bonds or obligations under seal, that shall be assigned under seal, the assignee may maintain an action in his own name against the *obligor or obligors*," it would be in direct violation of the policy and object of the act, to attach or extend the right here given, to a *surety* against his co-obligors. To them, he stands in an attitude entirely different from his relations to the principal debtor, against whom, where the surety pays the debt, the law provides the mode of redress in the 7th section. If, as a *surety*, he may, under the 9th section, sue all the obligors in the bond, the principal obligor is necessarily one among them, and the whole 7th section then becomes entirely nugatory, and without design or meaning. For it is as fully expressed in the first clause of the 9th section, giving the right to sue "the obligor or obligors," as if the party, "principal debtor, had been there introduced in so many words, and, consequently, the 7th section, for all that it contemplates, might as well be expunged from the act. We cannot concede, therefore, that this 9th section designs any thing more than to supersede the common law, and give to the assignee, as the holder of a bond of third parties, the right to sue *in his own name;* not to affect the pre-existing rules between the surety and his co-sureties, which would be productive of perplexity and confusion. The latter clause of the section is also additional evidence of this design, where further provision is made for the recovery of the debt from the obligee who assigns, but a *surety in the bond* is excluded from the benefit of it, and, indeed, from the whole tenor of the act, is precluded from suing on a bond in which he is a party, except against the principal debtor, under the terms of the 7th section.

Would not any other construction of this act of 1763, involve the inconsistency, that while the co-obligor has from the obligee an assignment of the whole debt, he has, in law, but a claim for one-half, and yet, under the act, must sue for the whole sum in the bond? He has on the face of the assignment the whole debt, and can only make it available against his co-surety for the half, while his right to the whole again-

the principal debtor is complete. Suppose, then, the principal and surety both sued, could he recover more than one-half against the surety? and yet his judgment against the principal, must be for the whole. Can such an incongruity subsist in law? and yet it must result from the principle here contended for.

The act of 1829, ch. 51, which entitles an equitable assignee to sue in his own name, which has also been cited in support of this form of action, cannot, in this view of the court, sustain the appellant. If it is wrongfully conceived under the act of 1763, ch. 23, it must be equally so under this act of 1829. The objections here urged, apply equally to both, and whatever rights or remedies were intended by them to be conferred upon assignees, which the common law did not confer, it is obvious, they were not designed to extend to the case of a *surety*, who pays the bond of the principal, and seeks contribution from his co-surety. The case is not within the provisions of either act, and the appellant must seek his remedy in another form of action.

This view of the case, renders it, of course, unnecessary to examine or express an opinion upon the alleged defect in the declaration, inasmuch as if the declaration were free from objection, still, in the judgment of this court, the action is misconceived, and the judgment below on the demurrer must be affirmed.

JUDGMENT AFFIRMED.

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JAMES H. CARTER *vs.* KEZIA CROSS, ADM'X OF ELLEN CROSS.—*December* 1848.

An action was instituted in March 1845, upon receipts dated in 1838, for money to be paid to certain creditors of the administratrix of the plaintiff, and in case of their refusal to receive the fund, it was to be repaid to the intestate. In 1838, all the creditors were paid, except one, who refused to receive his proportion of the fund. The defendant, *within three years*, said, that he had, shortly after the refusal of the unpaid creditor to receive his proportion of the money, loaned the amount offered to him, and lost it;

that his motive in making the loan, was to get rid of the money, and he never would pay it, unless the law compelled him. HELD, that these declarations were admissions, that the money had never been returned by the defendant; acknowledgments of a present subsisting debt due by him, and furnished no moral or legal excuse, why he should not pay the debt. The defendant's duty was to return the money, not risk it by a loan.

Under the circumstances of this case, the question of interest was for the jury, and the court refused to instruct them, that it could not be recovered anterior to the date of the writ.

APPEAL from *Baltimore* county court.

This was an action of *assumpsit*, brought on the 18th March 1845, by the appellee against the appellant. The defendant below pleaded the general issue and the act of limitations.

The plaintiff to maintain the issues on her part, offered in evidence two instruments of writing, admitted to have been signed by the defendant, the first of which is as follows:

"BALTIMORE, *March 22nd*, 1838.

Received of *Ellen Cross*, through the hands of *Daniel Hamer*, two hundred dollars, to be applied to the payment of *J. A. Cross'* debts, in the city of *Baltimore*, at the rate of thirty-three cents in the dollar, on the signing of a final release; in case of their refusal, the money to be returned to said *Ellen Cross*, so far as the same shall not be accepted by said creditors. Signed, J. H. CARTER."

The second is in the following words:

"BALTIMORE, *April the 2nd*, 1838.

Received of *Ellen Cross*, through the hands of *Daniel Hamer*, three hundred dollars, to be appropriated as the former receipt of two hundred dollars.

Signed, J. H. CARTER."

The certificate of the letters of administration on the estate of *Ellen Cross*, were admitted in evidence, by consent of counsel.

The plaintiff then gave in evidence by *John Hurst*, "that he was a member of the firm of *Barry and Hurst* in the spring of 1838, and that said firm were creditors of *J. A. Cross*, named in said receipts, to an amount between $900 and $1000. And further proved by said *Hurst*, that in the spring of 1838, the defendant called on said firm, and stated, that he had funds to

settle a dividend of thirty-three cents in the dollar, upon the claims against the said *J. A. Cross*, and offered to pay said firm, at that rate, upon their claim, provided they would execute a final release to said *J. A. Cross*, which the said *Hurst* and his partner refused to do. That the said *Carter* subsequently, at various times, shortly before and since this suit was brought, stated to the said *Hurst*, that he had, shortly after the refusal of *Barry and Hurst*, as aforesaid, loaned the amount of money, so as aforesaid offered to them, to a certain *Raymond*, upon his bond, secured by one *Anchor*, or to *Anchor*, on his bond, secured by *Raymond;* that his motive for making said loan was, that he wanted to get rid of the money, as he did not know what else to do with it, and he thought he was doing a favor to *Ellen Cross*, by loaning it out in that manner, as the security was then good. That he had taken the bond of said *Raymond* or *Anchor*, but the same had been mislaid by him, and *Anchor* had, shortly after such loan, died insolvent, and *Raymond* had gone away and proved worthless.

That in these conversations the said *Carter* never said, he had paid said sum of money to said *Ellen Cross*, or her administrator, but always said, he, the defendant, had not the money; he had loaned it away, and never would pay it, unless the law compelled him; and he said in said conversations, that he thought the money placed in his hands, was the money of said *J. A. Cross*, and was of that opinion, until he was afterwards shewn his, *Carter's*, receipts. And the plaintiff admitting, that said *Carter* had paid all the other creditors of the said *J. A. Cross*, their several proportions of the money placed in his hands, rested his case.

The defendant offered to the court the following prayers:

"1st. That upon the whole evidence, if believed by the jury, the plaintiff is not entitled to recover, because his cause of action was of more than three years' standing, before the impetration of the original writ in this cause, and because there is no evidence to remove the bar of the statute of limitations."

2ND. If the jury find from the evidence, that the money sued for was advanced by *Ellen Cross* to the defendant, for the purposes stated in the two receipts named in the evidence; and if

the jury further find, that the said *Carter* paid and satisfied all other creditors of *J. A. Cross*, meant to be provided for in said receipt, except *Barry and Hurst*, and that the said *Barry and Hurst*, in the spring of 1838, and after the said receipts, refused to accept their proportions of the money so advanced to the defendant, then there is no evidence in this cause, which can take the plaintiff's cause of action out of the statute of limitations, and the defendant is entitled to a verdict."

3rd. That the plaintiff is not entitled to recover interest on her claim, for any portion of time anterior to the date of the writ in this cause, because there is no evidence of any prior demand."

All of which prayers the court, (Le Grand, A. J.,) refused.

The defendant below appealed to this court.

The cause was argued before Spence, Martin and Frick, J.

By Brent for the appellant, and

By J. M. Buchanan for the appellee.

Spence, J., delivered the opinion of this court.

This was an action of *assumpsit*, in *Baltimore* county court. The defendant pleaded *non assumpsit*. *Non assumpsit, infra-tres annos*, and *actio non*. On these pleas issues were joined.

[The judge, adverting to the evidence and prayers as before stated, proceeded to say:]

We have presented the prayers of the defendant at length, to shew that the error, or defect in the declaration, namely, that it contained no count on the promise to the administratrix. (a point or question which was relied on in the argument,) does not appear by the record, to have been raised or made in the county court, and upon which that court rendered judgment, and, of course, it cannot, under the provisions of the act of 1825, ch. 117, be permitted to be urged or insisted upon in the trial of this appeal.

The question which the two first prayers raises, is the force and effect of the evidence, to remove the bar of the statute of limitations.

The execution of the two receipts, of March the 22nd, and April the 2nd, 1838, is admitted. The witness, on whose evidence the plaintiff below relied, to remove the bar of the statute of limitations, was *John Hurst*.

The receipts admitted in evidence, prove the receipt by *Carter* of the money, the object for which it was received, and *Carter's* promise to return it to *Ellen Cross*, in the event of the creditor or creditors of *J. A. Cross*, refusing to receive the composition of thirty-three cents in the dollar, and execute a release to *J. A. Cross*. *Hurst's* evidence proves the refusal of *Barry and Hurst*, to receive the composition and execute the release. The facts thus far referred to, occurred more than three years before the institution of this suit. But *Hurst*, in his evidence, further states, that *Carter* subsequently, at various times, shortly before and since this suit was brought, stated to said *Hurst*, that he had, shortly after the refusal of *Barry and Hurst*, loaned the amount of money offered to them, to a certain *Raymond* or *Anchor;* that his motive for making said loan was, that he wanted to get rid of the money.

That in these conversations *Carter* never stated, that he had paid said sum of money to *Ellen Cross*, or her administratrix, but always said, he had not the money, he had loaned it away, and never would pay it, unless the law compelled him. This is a full admission on the part of *Carter*, that the sum of money which he offered *Barry and Hurst*, as a composition of their debt due from *J. A. Cross*, and which they refused to accept, was never returned or paid to *Ellen Cross*. *Carter*, in all the conversations detailed by *Hurst*, never said, he had paid the said sum of money to *Ellen Cross*, but always said, "he had not the money, he had loaned it away, and never would pay it, unless compelled by law." If the question rested upon these admissions of *Carter*, without any qualifications, could there remain a doubt, but that they were an acknowledgment of a present subsisting debt, from which the law would raise an implied promise, by which the bar of the statute would be removed? What excuse did *Carter* offer for not paying this money? that he wanted to get rid of the money, as he did not know what else to do with it, and he thought it was doing

a favor to *Ellen Cross*, by loaning it out in that manner, as the security was then good; that he had taken the bond of *Raymond* and *Anchor*, but the same had been mislaid by him; *Anchor* had, shortly after such loan, died insolvent, and *Raymond* had gone away and proved worthless. The excuse offered for not paying the money, is a clear and unequivocal admission, that it never had been paid to *Ellen Cross*, but that he wanted to get rid of the money, which, in his receipt, he promised, under a certain contingency, to return to *Ellen Cross*, after that contingency did happen; he thought he was doing her a favor, instead of returning or paying her the money, to loan it out on securities, which very soon proved worthless.

Does the excuse set up by *Carter*, if taken as true, furnish a legal or moral excuse, why he should not pay the money? It was unquestionably his moral duty, when the money was refused by *Barry and Hurst*, to have performed his promise and discharged his legal obligation, by returning the money to *Ellen Cross*, as he contracted to do when he received it, and not to have loaned it out on securities, which very soon after proved worthless, without the knowledge or consent of *Ellen Cross*.

The acknowledgment of *Carter*, in the language of this court, in *Keplinger vs. Griffith*, 2 *G. & J.*, 301, "was a clearly implied admission, that the debt remained due and unpaid, and the excuse alleged for not paying it, furnished no real objection to the payment of it, if true."

The court committed no error in rejecting the defendant's third prayer, on the authority of *Newson's Administrators, vs. Douglas*, 7 *Har. & J.*, 453, and *Fridge vs. The State, use of Kirk*, 3 *G. & J.*, 103, the question of interest was properly left to the jury.

JUDGMENT AFFIRMED.

## Thomas C. Doremus, James Suydam and John M. Nixon, Survivors of Cornelius R. Suydam, *vs.* James M. McCormick.—*December* 1848.

In an action of debt, against a surviving partner, he pleaded a release. The plaintiff rejoined, that it was obtained by misrepresentation and fraud; that the defendant had represented, the partnership was not able to pay, and could not pay, more than about one-fourth of the debt, when, in fact, it was possessed of sufficient property to pay the whole claim, which the defendant well knew, and that in consequence of the said false and fraudulent representation, the plaintiffs executed the release. The plaintiffs gave general evidence of the condition of the partnership affairs, as represented by the defendant to them, the alleged insolvency of the firm, prior to and at the time of the release, and that the firm continued until death of the other partner. The deceased partner, on being informed, prior to his death, of the settlement with the plaintiffs at one-third of their claim, said, that the firm had, at the time of said alleged settlement, funds sufficient to have paid the plaintiffs in full, in the hands of the defendant, as liquidating partner. Held, that this declaration of the deceased partner, was evidence to affect the defendant as his survivor.

An innocent partner is constructively responsible for the fraudulent acts of his co-partner, when those acts are committed within the range and scope of partnership transactions.

The representation of any fact, or a misrepresentation of any fact, made in any partnership transaction by one partner, is considered as the act of all the partners, and will bind the firm.

The fraud alleged to have been practised in this case, as the means of procuring the release, was connected with a partnership transaction, and employed by one partner, as a false pretence, to obtain a paper, in the execution of which the firm was interested.

The composition of a debt, either as a creditor or as a debtor, is one of the acknowledged and frequently exercised powers of a partner. Is within the scope of his authority.

Appeal from *Baltimore* county court.

This was an action of *debt*, brought by the appellants against the appellee, as surviving partner of *James M. Lightner*, for $4012.01¼, in the debet and detinet. The plaintiffs counted on a judgment obtained in the State of *Alabama*, on the 27th July 1840, against the appellee and his deceased partner, for $3995.95 damages, with interest, and $16.6¼ costs. The defendant pleaded *nil debet*, and *actio non accrevit infra tres annos*. The plaintiff demurred to those pleas, and they were

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withdrawn by the defendant, and he then pleaded the following release, of which oyer was craved and granted:

"Know all men by these presents, that we, *Thomas C. Doremus, Cornelius R. Suydam* and *John M. Nixon*, composing the firm of *Doremus, Suydam and Nixon*, all of the city and State of *New York*, for and in consideration of the sum of one thousand dollars, paid us by *James M. McCormick*, of the city of *Washington*, the receipt whereof we do hereby acknowledge, have released, acquitted and discharged, and by these presents do acquit, release and discharge, the said *James M. McCormick* and *James N. Lightner*, of and from all debts and demands whatsoever, due or owing to us, jointly and severally, from said *McCormick* and *Lightner*, jointly and severally, arising from notes, bonds, bills, judgments, or in any other way whatsoever, at any time heretofore, to this date; and we do further, jointly and severally, covenant and agree, to release all claim and lien on any land of said *McCormick*, in the State of *Alabama*, in consequence of any judgment, execution or other process thereon, and bind ourselves, to execute any deed or writing that may be necessary to release such land from any such claim, or lien, or process; and in case the said land shall have been sold under any such judgment, execution or process, then to refund and pay the said *McCormick* whatever sum or sums of money the same may have been sold for. Witness our hands and seals, this 2nd day of April, A. D., 1841.

| | | |
|---|---|---|
| *April, A. D.*, 1841. | Thos. C. Doremus, | (Seal.) |
| Signed, &c. | Chas. R. Suydam, | (Seal.) |
| | John M. Nixon, | (Seal.)" |

To this plea the plaintiffs replied, that the said supposed writing of release in the said plea mentioned, was obtained from the said *Thomas C. Doremus, Cornelius R. Suydam* and *John M. Nixon*, by the said defendant, by fraud, covin, and misrepresentation; that is to say, by the said defendant, falsely and fraudulently representing to the said *Thomas C. Doremus, Cornelius R. Suydam* and *John M. Nixon*, that the said defendant and the said *James N. Lightner*, were not able to pay, and could not pay to the said plaintiffs, more than the said sum of one thousand dollars of the said debt of the said

defendant, and the said *Lightner* to the said plaintiffs: when the said defendant and the said *Lightner* were possessed of property sufficient to pay, and were able to pay, and could well have paid to the said plaintiffs the whole of their said debt, which the said defendant well knew; in confidence of which said false and fraudulent representation, the said *Thomas C. Doremus*, *Cornelius R. Suydam* and *J. M. N.*, did execute the said writing, to wit, at the county aforesaid, wherefore the said plaintiffs say, that writing was and is void in law, and this they are ready to verify.

The defendant rejoined, that the said writing of release, so sealed as aforesaid, and in the said replication mentioned, was obtained by the said defendant fairly and honestly, and not by fraud, covin, or misrepresentation, in manner and form as the said plaintiffs have in their said replication above alleged, and this the said defendant prays may be enquired of by the country, &c.

1st Bill of Exceptions. The plaintiffs to sustain the issue on their part, produced in evidence, upon the trial of this cause, a duly authenticated copy of the record of judgment, rendered in the county court of *Coosa* county, in the State of *Alabama*, on the 27th day of July 1840, in favor of the said plaintiffs, and against the said defendant and his deceased partner, (in his lifetime,) in manner and form, and to the tenor and effect set forth in the declaration; and then read to the jury the release pleaded by the defendant, and produced by him on *oyer* thereof prayed.

The plaintiffs then produced in evidence a letter from the defendant to the plaintiffs, viz:

"Washington City, *May 28th*, 1840.

Messrs. Doremus, Suydam & Nixon,

*Gentlemen:*—You are aware, ere this, of not only *James M. McCormick* being here, but also *J. N. Lightner*, and that we have made propositions to our creditors, and are settling off with them. We address you to say, that if you are disposed to settle on any kind of fair terms, that we will give you an equal chance with the balance of our creditors. You can judge for yourselves, whether it is better for you to compromise

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and get something that you can realise on, or to be continuing a suit at a large expense, and then you can obtain nothing more, nor perhaps one-half as much as now we are willing to allow you. If you had have known your own interest when your agent first called on us, you would have acceded to our proposition and jumped at it; and should you ever do business with the south, you will make that discovery; you have some good debtors south; you can inform your agent here if you are disposed to make a compromise, and I can be found in the city. Yours, &c., LIGHTNER & MCCORMICK,

Per *J. M. McCormick.*"

The plaintiffs then proved by *Z. Collins Lee*, that in the spring of 1840, he was employed by the plaintiffs, as their attorney, to collect from the defendant and his then partner, *Lightner*, the debt due by them to the plaintiffs, for which the judgment declared on in this case, was afterwards obtained in *Alabama*. The witness brought suit accordingly, in *Washington*, to the March term of 1840, and the defendant, *McCormick*, was arrested under the writ. The witness had several conversations and interviews with the said defendant, about that time, in relation to the said claim and the settlement thereof; said defendant uniformly represented to the witness on those occasions, that the affairs of the firm of *L. and McC.* were very bad. He spoke something of a house in *Wetumpka*, *Alabama*, which he said was worth about three thousand dollars, but said, that the firm could do little or nothing towards the payment of its debts. Witness offered to take fifty cents on the dollar in the notes of the firm, with the endorsement of the defendant's father. This the defendant refused, said he would give no notes and no security, and talked, witness thinks, of twenty-five cents on the dollar, as the utmost possible payment that the firm of *L. and McC.* could make. The witness thinks this, because he finds, that in a letter of his own to his clients, he enquires of them in regard to a settlement at that rate. The defendant further said, that the bankrupt act would soon pass, and would relieve them altogether. In consequence of these conversations, and of a letter from said defendant to the witness, dated June 2nd, 1840, the witness

further proved, that on June 7th, 1840, he wrote a letter to the plaintiffs, containing a copy of the said last mentioned letter of the defendant. The witness further proved, that after diligent search for the defendant's letter of June 2nd, 1840, so last mentioned, he had not been able to find the original, but that his own letter of June 7th, 1840, contained a true copy thereof. The said letter of the witness, and said copy of the defendant's letter, were then read in evidence by the plaintiffs.

BALTIMORE, *7th June*, 1840.

*Gentlemen:*—I received last evening a letter from *L.* and *McC.*, to the following effect:

"WASHINGTON, *4th June*.

To Z. C. LEE, ESQ.,

*Sir:*—I received yours of the 3rd to-day, and, in reply, am sorry to inform you, that I never have once surmised such a thing as to give *Messrs. D., S.* and *N.*, our notes, with security, either in the south, east, north or west, and as to father, he will lose about $2000 by me already, and rather than he should lose one dollar more, I would go to jail and stay for twelve months, if necessary; but I have as good counsel as there is in this city, and he informs me, that, (even if the bankrupt law is not acted upon this session,) there will be no occasion to go for one hour; *Messrs. D., S.* and *N.*, have hunted me like a dog, and sued me here in *Alabama*, and even attempted to hold a poor innocent man, (because, unhappily for him, his name was *McCormick*,) to bail in their own State, although he had a different surname; and, even after all this, require *more* than any other creditor has required of us. I settled a claim of $2000 with a real gentleman a few days ago for $794, and then did not endorse a note, nor did he know either of the drawers of the same. *D., S.* and *N.* never once thought that I would appear here, but that the old man would have to pay it; but instead of one, both of us are here, and ready to stand the test, if forced to it. Although it is somewhat unpleasant, if it could be avoided, and for that reason I thought proper, without consulting *Lightner*, to offer them such a settlement as we can honestly afford them. We have settled a large amount of our debts since this suit, and if it had

not have been for it, would have settled all, and we have not endorsed or given the first new note, nor do we ever intend to do so, as neither of us are worth anything, as we lost, by different ways, a great deal more than half of our capital in business in *Wetumpka*, it would always be hanging on us. Now, to come to the matter respecting their claim, we have not got any kind of funds, (except the *Trading Co's*,) sufficient to pay them twenty-five cents in the dollar, in cash or paper. We contemplated securing them, by having some very valuable property assigned to them, which has cost us $2700, and upon which there is still due $900, making it stand at $3600, and which now, although rents have fallen at least fifty per cent., still rents for $100 per annum. This property is so secured, that it cannot be got at by any legal proceedings, and would now command about $2500 to $3000, on a moderate credit, and the property to be liable for the purchase money. If they would release us and pay costs of suits, we would have this fixed for them. This is the best proposition we can offer, and more than we have given any of the rest of our creditors, and the only one we will do. They made at least twenty-five or thirty per cent. on their goods; I know from the same kind of goods bought at the same time and brought to *Wetumpka*, and I said to *Lightner* at the time, that they did not expect to be paid, and knew it when the notes were given at six, seven and eight months, when all goods bought for the south, are always purchased at twelve months; but, on the maturity of two of the notes, we proposed paying them one-half cash, and extending the balance three, four and five months, and while their agent, who was there, (had not sense enough to jump at it,) was pretending to reflect on it, the *Trading Co.* run off, while I, in endeavoring to secure $10,000, was nabbed like a runaway, when I went boldly through their own city and stopped there.

You have therefore the only proposition that is in my power I assure you, and a good one, if you accede to it, on your part; this is not as yet been made to any one of our creditors, and would answer your clients, I have no doubt. If you think you can accede to it, you can bring our notes down, and I will

arrange it with you; if this does not suit you, please answer, as we can arrange other claims with it. This is a fair statement of facts, and I hope it may be satisfactory to you, and if I have expressed myself too warmly, I assure you it is not intended with any disrespect to you.

Very respectfully, &c.,

LIGHTNER & MCCORMICK,

Pr. *J. M. McCormick.*"

"This, gentlemen, you will perceive the whole case as made out by the debtors. The property referred to by them, is not located or described, I presume it is in the south. I shall await to hear by return mail your opinion and instructions, and will then repair to *Washington*, and make the best settlement in my power; early and final action is most desirable, and some compromise ought to be made, for I foresee that they will take the benefit, if pressed; my time is much occupied, and engagements in court, now settling here, engross me, of course I shall relinquish all, and expect from you additional compensation, when the matter is closed by me; they are so cornered by my plans at *Washington*, that I will make the best possible settlement for you, and therefore must give it immediate personal attention.

If twenty-five per cent. cash is offered on the debt and interest, will you take it in preference to the property? In your letter please inform me, whether I can hold a party to bail now in your State on a note or bond? (In haste.)

I am yours with esteem, Z. COLLINS LEE.

P. S. I wish *Pryor* had returned me the original notes; I have copies, however, that will answer. Z. C. L."

The witness further proved, that afterwards, in the month of September or October, 1840, *Doremus*, one of the plaintiffs, passed through *Baltimore* on his way to *Washington*, for the purpose of making some settlement with the defendant. The witness then communicated to said *Doremus*, the representations which the defendant had verbally made, in regard to the ability of *L.* and *McC.* to pay their debts, and renewed to said *D.* the advice, to take twenty-five cents on the dollar, which was contained in his letter of June 7th. Sometime afterwards,

the release, which the defendant has pleaded, was executed, and the witness dismissed the suit in *Washington*.

The plaintiffs then read in evidence a letter of the defendant to the plaintiffs, dated February 27th, 1841.

"Washington, *Feb'y 27th*, 1841.

Messrs. Doremus, Suydam & Nixon, *New York*,

*Gentlemen:*—I have at length made an arrangement, at a sacrifice, to settle your claim, if you are disposed to accede to the terms that you agreed to when here, to take one thousand dollars, and allow me the benefit of the land, if sold, under your judgment against *L.* and *McC.*, in *Alabama*. If you think proper to accept of it, while I have it in my power of doing it, you will please either come on, (or send, or authorise some one, by power of attorney, to give the requisite release of all claims against said firm,) and I will pay over to you the money immediately. The land I can use to more advantage, in my settling the other debts of the firm, than I supposed when I offered it to you. Or, if you would rather release me and hold on to *Lightner*, I will give you six hundred dollars; but the land is mine, and you would have to allow me it, as before mentioned. If you would come on immediately, as there are a great many coming, you might see old *Tip* inaugurated. You will please let me know, if you do not think proper to come on, I cannot do any better I assure you, and have been greatly bothered to raise the other $500, as I told you that I only had $500, *Alabama* note. You can do as you think fit in the matter, you have your own proposition now offered to you, and all that I can do.

Very respectfully yours, J. McCormick,

In liquidation of *Lightner & McC.*"

Also a letter from the same to the same, dated March 31st, 1841:

"Washington City, 31*st March*, 1841.

*Gentlemen:*—Annexed, you have the bill of costs in suit against us, paid by me, and have to inform you, that although I have suffered largely by *Lightner*, still he has me bound up in such a manner, that I could not agree to let you hold him responsible, and pay you the amount you ask, as he is as much

interested in the amount to be paid nearly as myself, and I assure you, that it would be of no advantage to you, as there are judgments against him for ten or fifteen thousand dollars, besides large claims not yet sued on, and which are, some of them, confidential debts, and, moreover, his health is such, that I doubt if he ever recovers it, and if he does, it will be a long time; he holds no property that I know of, and his father is an insolvent debtor; so you see that prospects are not flattering. You have also enclosed the release, which I hope that you will agree to and acknowledge before the proper authorities. I have used every exertion to raise this sum for you, and I am sorry that it has incurred the great rate of discount, now between the *Alabama* funds and *Virginia* here, as I have not a cent left, and actually have to beg a friend, noways connected in family, for a portion of it, and how I shall be able to pay it do not know. The bill of costs annexed includes all, clerks, attorneys and marshal. The release is plain and fair, I think, and hope that you will acknowledge it before a notary public, or some competent officer, and enclose immediately, together with an order to *Mr. Brent*, the clerk here, for to strike off the suit from the docket, and *Mr. Riggs* shall have a check for you for the $1000, upon the proper acknowledgment and presentation of the release.

I am very respectfully yours,

JAS. M. McCORMICK."

The plaintiffs then further proved by *Mrs. Caroline Asprill*, that she is the sister of *Lightner*, the deceased partner of the defendant, and that she went to *Wetumpka*, (where the said parties carried on their business, under the firm of *L. and McC.*,) on the 31st day of March 1838, and resided there until July 7th, 1838, during which time both of the said partners boarded with her. At the end of that period, she returned to *Baltimore*. Her brother, the said *L.*, came to *B.* in the fall of 1838, returned to *Alabama*, and, on the 27th of April 1840, came back to *B.* very ill, to the witness's house, whence, after a short time, he went to *Cecil* county, and returned to the May convention in *Baltimore*. He then lay sick for a considerable time, at the house of the witness, and as she was obliged to give

him constant attention, he lay principally in her own room. *Sometime in May or June*, 1840, *McCormick, the defendant, came to the house of the witness to see her brother, his partner, and the witness proved, that she was present at a conversation between them, in regard to their business. Lightner asked the defendant how he was getting on with his settlements. The defendant produced a number of papers, and they talked over the business. The defendant said, that he had funds in hand to the amount of* $8000, *and that if they could settle, as he expected, with their Baltimore and New York creditors, and could arrange with Doremus, Suydam and Nixon, (the plaintiffs,) at sixty cents on the dollar, they would have* $4000 *left for a plank in Texas.* The brother of the witness replied, that he should be in his grave before that would happen. The witness further proved, that she was intimate with the defendant, and that both the defendant and her brother were in the habit of speaking freely, to her and in her presence, of all their business. The said defendant several times afterwards, between the date of the last mentioned conversation, and that of the release aforementioned, came to the house of the witness and spent the day; on one of these occasions, he said to his partner, in the presence and hearing of the witness, that he had settled satisfactorily with the *Baltimore* and *N. Jersey* creditors of *L.* and *McC.*, and that *D.*, *S.* and *N.*, (the plaintiffs,) were the only remaining creditors.

The witness further proved, that in the spring of 1841, she saw and read a letter from the said defendant to his partner, her said brother, in which said defendant wrote, that he had settled with the plaintiffs at thirty-three and one-third cents in the dollar. For this letter, the plaintiffs proved, that diligent search had been made among the papers of the deceased partner, *L.*, but that the same could not be found.

The plaintiffs further proved, by the said *Caroline Asprill*, that in April 1841, she had a conversation with the defendant, in which he informed her, that he had settled with the plaintiffs at thirty-three and one-third cents in the dollar. The witness further proved, that her said brother, *L.*, died on June 29th, 1841, and that the partnership of *L. and McC. continued until*

*his death*. The last conversation between the defendant and *L.*, was in February or March, 1841, the witness thinks, and that was the last time that the defendant ever saw *Lightner*.

The plaintiffs then offered to prove by the said witness further, that her said brother, upon being informed of the said alleged settlement by the defendant with the plaintiffs, at thirty-three and one-third cents on the dollar, which information he received, as aforesaid, in the spring of 1841, and during the continuance of the partnership, said to the witness, that the said firm of *L. and McC.* had, at the time of said alleged settlement, funds sufficient to have paid the debt due to the plaintiffs in full; and further stated, that said funds were, at the time of said settlement, in the hands of the said *McC.*, as liquidating partner, the said *McC.* was not present at the time when said *L.* made said declarations. But the said defendant objected to the admissibility of the declarations of said *Lightner*, and the court, (Purviance and Le Grand, A. J.,) being divided in opinion, refused to admit the said declarations, and did not admit the same to go to the jury.

To which refusal and the non-admission of said evidence, the plaintiffs excepted.

The plaintiffs below appealed to this court.

The cause was argued before Spence, Martin and Frick, J.

By S. T, Wallis for the appellants, and
By Wm. Schley for the appellee.

Martin, J., delivered the opinion of this court.

In this case, an action of debt was instituted upon a judgment, rendered in favor of the appellants against the appellee, and *James N. Lightner*, in one of the courts in the State of *Alabama*. The suit was brought against the appellee, as the surviving partner of the firm of *Lightner and J. McCormick*, and the judgment on which it was based, bears date on the 27th of July 1840, and was for the sum of four thousand and twelve dollars, and one-fourth cents.

The defendant pleaded in bar a release. This release was dated on the 2nd of April 1841, and recites: "That in consideration of one thousand dollars, paid to the appellants by *James M. McCormick*, they acquit, release, and discharge the said *James M. McCormick* and *James N. Lightner*, of and from all debts and demands whatsoever, due or owing to the plaintiffs, jointly or severally, from said *McCormick* and *Lightner*, jointly and severally, arising from notes, bonds, bills, judgments, or in any way whatsoever, at any time prior to the date of the said release; and they further, jointly and severally, covenanted and agreed, "to release all claim and lien on any land of the said *McCormick*, in the State of *Alabama*, in consequence of any judgment, execution, or other process thereon;" and they bound themselves "to execute any deed or writing, that might be necessary to release such land from such claim, lien or process, and in case it should have been sold under any such judgment, execution or process, to refund and pay the said *McCormick*, whatever sum the same might have been sold for."

The plaintiffs craved oyer of this release, and by their replication alleged, that it was obtained from them by the defendant, by fraud, covin, and misrepresentation, that is to say, by the said defendant, falsely and fraudulently representing to the plaintiffs, that the said defendant and the said *Lightner* were not able to pay, and could not pay, more than one thousand dollars of the said debt, when the said defendant and the said *Lightner* were possessed of property sufficient to pay, and were able to pay, and could well have paid, the whole of the said debt, which the defendant well knew; "in consequence of which said false and fraudulent representation, the plaintiffs did execute the said writing."

The defendant, by his rejoinder, traversed the fraud, and tendered an issue thereon to the country, in which the plaintiffs joined.

At the trial of the cause, the judgment and release were offered in evidence; the plaintiffs also introduced several letters signed by *McCormick*, in the name of the firm, anterior to the settlement and release; also certain statements made by the

defendant to the counsel of the plaintiffs; and then proved substantially by *Mrs. Asprill*, (the sister of *James N. Lightner*,) that *Lightner* died at her house, in *Baltimore*, on the 29th of June 1841, and that the partnership of *Lightner and McCormick* continued up to the period of his death. They further proved by this witness, that the defendant had several interviews with *Lightner*, during his sickness at her house. That on one occasion, *McCormick* produced a number of papers, and that *McCormick* and *Lightner* talked over their business, in the presence of the witness, who was intimate with both of them, and familiar with their affairs. And that in this conversation, *McCormick* said, "that he had funds to the amount of $8000 in hand, and if they could settle with their *Baltimore* and *New Jersey* creditors, as he expected, and could arrange with *Doremus*, *Suydam* and *Nixon*, at sixty cents in the dollar, they would have $4000 left for a plank in *Texas*." The same witness further stated, that *McCormick* afterwards told her brother, in her presence, that he had settled with the *Baltimore* and *New Jersey* creditors satisfactorily, and that the appellants were the only remaining creditors. And in the spring of 1841, *McCormick* wrote to *Lightner*, and likewise informed the witness, that he had settled with the appellants at thirty-three and one-third cents in the dollar.

The appellants then offered to prove by the witness, "that her brother, on being informed of the said settlement by the defendant with the plaintiffs, at thirty-three and one-third cents in the dollar, which information he received in the spring of 1841, and during the continuance of the partnership, said to the witness, that the said firm of *Lightner and McCormick*, had, at the time of said alleged settlement, funds sufficient to have paid the debt due to the plaintiffs in full; and further stated, that said funds were, at the time of said settlement, in the hands of *McCormick*, as liquidating partner."

The appellee was not present when these declarations were made by *Lightner*.

The appellee objected to the admissibility of the declarations thus offered: the declarations were rejected by a divided court, and the sole question presented for our consideration by this

exception, is, whether the declarations of *Lightner* were admissible and competent evidence for the plaintiffs, upon the issue joined between the parties in this cause?

It is conceded in this case, that the declarations in question were made by *Lightner*, during the continuance of the partnership between *McCormick* and himself; and it is apparent from the whole testimony in the cause, that the appellee, in procuring this release, acted for and represented the firm. The proof furnished by the letters of the appellee, is conclusive upon this subject. They prove, that the debt originally contracted was a partnership debt, for which *Lightner* and *McCormick* were responsible *in solido*, and that the *Alabama* judgment was rendered against them as partners. It will be seen, by an examination of the evidence exhibited in the exception, that the appellee, in his correspondence with the appellants, and in his negotiations with *Mr. Lee*, with respect to the settlement of this claim, invariably speaks of this debt as a partnership debt, and complains of the inability of the *firm* to discharge it. In his interviews with *Lightner*, pending these negotiations, *McCormick* referred to this claim as a matter in which *Lightner* was interested, informing him, "that if he could arrange with the appellants, at sixty cents in the dollar, *they* would have $4000 for *Texas;* the release, by its terms, professes expressly to discharge, not *McCormick* alone, but *McCormick* and *Lightner*, from all judgments, &c., existing at any period prior to its date; and it is perfectly clear, that if the predicament of these parties had been altered, and the suit had been instituted upon this judgment, against *Lightner*, as the surviving partner, he could have interposed this release, assuming it to be valid as an absolute bar to the action. The release is to be regarded, as a contract between the appellants and the firm of *Lightner and McCormick*, obtained through the instrumentality of *McCormick*, as the active and liquidating partner. The action was properly brought against *McCormick*, as the surviving partner of the firm of *Lightner and McCormick*, and, as a general principle, the admissions of *Lightner* touching this release, would be considered as the admissions of the defendant, and therefore admissible evidence against him.

An approved writer upon this subject, says:

"As soon as evidence of the partnership is established, the acts, admissions, and declarations of one partner, in matters relating to the affairs of the partnership, will be evidence against the firm. In this respect, the partners are to be considered as one person, and therefore the rule will hold good, although the partner making the admission is not a party to the record." *Coll'r on Part., sec.* 779.

In the case of *Boyce against Watson*, 3 *J. J. Mar.*, 500, the declarations of a partner, upon whom *the capias* had not been served, were admitted as evidence against his co-partners, and the court correctly held:

"That the confessions of a partner, are not admissible as evidence against his co-partners, on account of having been served with process, but of their *unity* as partners." And in *Reimsdyk vs. Kane*, 1 *Gal.*, 635, *Mr. Justice Story* said:

"I admit, the answer of one defendant cannot in general be read against another defendant; otherwise such co-defendant would be deprived of the opportunity of cross-examination. But this rule is liable to exceptions, and, therefore, where the confessions of any party would be good evidence against another, his answer, *a fortiori*, may be read against the latter. In cases of partnership, the confession of one partner in relation to a partnership concern, is in general admissible on an action against the other. It is not evidence to prove the partnership itself, but that being once admitted, or proved *aliunde*, the confession is let in for all collateral purposes."

By turning to the pleadings in this case, it will be perceived, that the replication charges, that this release was obtained from the plaintiffs, by the fraud and misrepresentation of the appellee. The specification of the fraud is, that the defendant falsely and fraudulently represented to the plaintiffs, that the defendant and *Lightner* were not able to pay more than one thousand dollars of the debt, when they possessed property sufficient to pay the whole of the debt, and that this fact was known to the defendant.

This fraud was traversed by the defendant's rejoinder, and the plaintiffs, as one of the items in their proof, conducing to

show that the imputed fraud was perpetrated by the defendant, offered in evidence the declarations of *Lightner*, for the purpose of establishing before the jury, not only that the firm of *Lightner and McCormick* was, at the time of the settlement, abundantly able to pay the entire debt, but that this fact was known to the defendant, as he had ample funds in his hands, as the liquidating partner of the house.

There is no evidence in the case, indicating that *Lightner* was privy to the fraudulent misrepresentations imputed to the defendant; and the counsel for the appellee has contended, that this fraud, if perpetrated, is to be considered as the individual act of the defendant, not within the scope and limits of his authority as one of the partners, and for which, therefore, the firm was not responsible. It was insisted, that fraud is, from its nature, necessarily a personal act, and that the partnership contract is not to be interpreted, as communicating to one of the members of the firm the power of implicating his associates, by his fraudulent misrepresentations. That the fraud complained of, is to be treated as the fraud of the defendant in his individual capacity, and not as the fraud of the firm of which he was a member.

This point was pressed upon the court with great force and power by the counsel, and assuming his proposition to be correct, it would follow as a corollary, that the declarations of *Lightner*, with respect to this alleged fraudulent transaction, would be considered as the declarations of a mere stranger, and as such clearly inadmissible.

But an insuperable answer to the proposition of the counsel for the appellee, is, that according to the established and acknowledged doctrine of the common law, an innocent partner is constructively responsible for the fraudulent acts of his co-partner, when those acts are committed within the range and scope of the partnership transactions. The representation of any fact, or a *misrepresentation* of any fact, made in any partnership transaction, by one partner, is considered, *Judge Story* says, as the representation, or misrepresentation of all the partners, and will bind the firm. *Story on Part.*, *sec.* 107.

Again the learned commentator says:

"The principle, (alluding to the doctrine, that the representations and admissions of one partner, within the limits of the partnership, are considered as the representations and admissions of all the partners,) extends further, so as to bind the firm for the frauds committed by one partner, in the course of the transactions and business of the partnership, even when the other partners have not the slightest connection with, or knowledge of, or participation in the fraud;" for he remarks, it has been justly observed, "that partners, by forming this association, declare themselves to the world, as satisfied with the good faith and integrity of each other, and impliedly undertake to be responsible, for what they shall respectively do within the scope of the partnership concerns." *Story on Part., sec.* 108.

This principle, thus announced by *Mr. Justice Story*, was directly affirmed by *Abbott*, as the chief justice of the *King's Bench*, in the case of *Rapp against Latham and Parry*, 2 *Barn. & Ald.*, 795; and a similar doctrine was enunciated by the court, in the cases of *Stone vs. Marsh*, 6 *B. & Cres.*, 551, and in *Boardman against Gore*, 15 *Mass.*, 335.

What then was the character of the fraud alleged to have been practiced by the appellee, as the means of procuring this release? Was it not connected with a partnership transaction, and employed by him, as a false pretence, to obtain a paper, in the execution of which the *firm* was interested?

It is impossible, that any other than an affirmative answer can be returned to these questions.

The composition of a debt, either as a creditor, or as a debtor, is one of the acknowledged and frequently exercised powers of a partner. It is strictly within the scope of his authority. In the composition of this debt, the appellee presented himself to the appellants, as the representative of the firm of *Lightner and McCormick*, seeking to adjust and settle a partnership debt. By compounding this large claim for the sum of one thousand dollars, the partnership was greatly benefitted. The appellants dealt with the appellee, not as an individual, but in his capacity of partner, and were entitled to consider his representations, with respect to the insolvency of the firm, as the representation of both of the partners.

Upon this ground, we think, the declarations of *Lightner*, as offered by the appellants, were admissible in evidence, and that the court below erred in rejecting them.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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DAVID SINDALL, AND JANE, HIS WIFE, *vs.* JAMES MASON CAMPBELL, THOMAS P. CONWAY, DORCAS SPARKS, AND CATHARINE CONWAY.—*December* 1848.

A father died in 1810, leaving a widow and three children. He was owner of freehold and leasehold property. The widow received the rents and profits, educated the children, and, in 1816, married again, settling her portion of the estate upon herself for life, with remainder to the three children. In 1821, she settled her final administration account, and passed the leasehold titles to the children. In 1824, one of the daughters married, and, with her husband, continued to live with the mother, as before. In 1831, all the parties interested united with one of the children, to sell a portion of his father's estate. He received the purchase money, and released his interest in the residue to his two sisters. The estate was worth about $200 per annum. In 1842, the married sister furnished an account, admitting, in 1839, '40, and '41, the payment to her of sums of money monthly, accompanied with a letter from her, stating, that "in 1839, it was agreed, I should receive a part of the rent out of my father's estate." In that account, she claimed a small balance, and offered to pay her proportion of taxes. HELD, upon a bill filed in 1842, for a partition and sale, that under such circumstances, the widow and mother, with the consent and acquiescence of the children, received and distributed the rents of the property up to 1839; that she was not intruder into, nor a voluntary trustee over the estate.

That in such case the land being sold, and account of rents taken, the allowance to the widow, in lieu of dower out of her husband's freehold estate, was not to be postponed to the claim of the children for rents and profits.

That the letter written by the married sister to her mother, in 1842, must be presumed to be written as the agent of her husband, and with his approbation and consent.

A memorandum filed in a cause, objecting to the competency of testimony, not signed by counsel, is not an exception within the act of 1832, ch. 302, sec. 5.

Where equity and law have concurrent jurisdiction over the same subject matter, the plea of limitations is equally available in both tribunals. In such case, equity follows the law.

Long acquiescence and lapse of time in obedience to the statute of limitations, is a bar to a bill for an account.

Appeal from the Equity Side of *Baltimore* county court.

The bill in this cause was filed on the 31st August 1842, by the appellants against the appellees. It alleged, that *Thomas Conway* was seized in fee of a lot, describing it, died intestate about the 16th August 1810, leaving a widow, *Dorcas Conway*, (now *Sparks*,) and three children, *Jane*, *Thomas P.*, and *Catharine;* that *Thomas*, the father, had also certain leasehold property; that the appellee, *Dorcas*, administered on his estate, paid all his debts, and administration of his personal estate finally settled on the 26th July 1821, and the leasehold estate passed over to his distributees; that on the 8th June 1831, *Dorcas*, *Thomas P.*, the *appellants*, and *Catharine*, joined in a sale and deed of one of the lots, at the request of *Thomas P.*, who received the purchase money therefor to his own use, and afterwards, on the 13th April 1841, acknowledged a deed of release of all his interest and estate, as one of the heirs and distributees of his father, to *Jane Sindall* and *Catharine Conway;* that the said *Dorcas*, before her intermarriage with *Sparks*, conveyed all her estate to *J. F. Moranville*, on the 24th August 1816, in trust for her sole use, for life, with remainder, equally to be divided amongst the said *Thomas P.*, the *appellants*, and *Catharine;* that the trustee *M.* is since dead, without heirs; that the appellants and *Catharine*, are each seized in fee of one undivided half part of the lot held in fee simple, subject to the dower of the said *Dorcas* therein, and a like interest in the other lots, and also an estate in other lots, dependent on the life of the said *Dorcas;* that the said *Dorcas* and *Catharine* are, and ever have been, since the death of *Thomas Conway, in the receipt of the whole of the rents and profits of the said lots, and have refused to account* for the same; that the said property is not susceptible of an advantageous partition amongst those interested, and that it would be to the advantage of all parties interested therein, that the same should be sold for a division; that in this the appellees refuse to unite or join in any sale or partition. Prayer, for an account, sale, and distribution, &c.

After answers on the 1st May 1843, *Baltimore* county court decreed a sale for a partition by trustees.

The trustees reported a sale, which was finally ratified. *Dorcas Sparks* died, and *James Mason Campbell*, her *adm'r c. t. a.*, was made a party.

The cause was then referred to the auditor, the proof taken before him is sufficiently stated in the opinion of the judge of this court.

The auditor reported a statement of rents received by *Dorcas Sparks*, from 20th July 1821, and 8th June 1831, and from that time to September 1843.

And also an account between *J. Mason Campbell*, administrator of *Dorcas Sparks*, *debtor*, and *David Sindall and wife*, of the 25th May 1844, in which he allowed the appellants two-ninths of the rent, from 20th June 1821, to 8th June 1831, $582.08, and for one-third of the rents, from 8th June 1831, to September 1843, $927.44, and credited him with $26.70, amount allowed out of sale for dower interest of said *Dorcas*.

The auditor reported, he had made the foregoing account under instructions from the appellants, not being able in the present state of the cause to make up a full account, without undertaking to decide questions which properly belonged to the county court.

A sale made in June 1843, was also distributed by the auditor.

The defendant, *Campbell*, excepted to the account of 25th May 1844, because it allows to the complainants the dower interest of *Dorcas Sparks*, upon a pretence of their being creditors, which, if it were true, would not entitle them to more than a proportion of her estate, against which there are other unsatisfied claims now lodged with this exceptant, as her administrator. That the statement of rents is unsupported by evidence, is erroneous, both in assuming the receipt of a greater amount than was received, and in allowing no discounts, and also in going back to a period not warranted, either by the pleadings or proofs, for commencing to charge said receipts.

That it allows *Sindall and wife* a greater amount than is due them.

On the 30th May 1846, the auditor reported other accounts.

In one of which sales made by the trustees, to amount of $755, were distributed as follows:

| | | |
|---|---|---|
| 1. Expenses, - - - - - - - | | $178 28 |
| 2. To *David Sindall and wife*, for one-half balance, - - | $288 36 | |
| Deduct one-half rent received by them, and payable to *Catharine Conway*, - - - - | 39 52 | 248 84 |
| 3. To *Catharine Conway*, - - | 288 36 | |
| Add above rent received by *D. S.*, | 39 52 | 327 88 |
| | | $755 00 |

In Account A :—

| | |
|---|---|
| Statement of rents received up to to September 1843, as per statement 25th May 1844, - | $5401 71 |
| *David Sindall and wife's* proportion, - - | 1509 52 |
| Amount of credits claimed, &c., - - - | 439 58 |
| Amount due *D. S. and wife*, - - - | $1069 94 |

Account B :—

| | |
|---|---|
| *David Sindall and wife's* proportion of rents for *three years next before filing the bill*, one-third of $880, - - - - - - | $293 33 |
| Do. from filing bill to September 1843, one-third of $880, - - - - - - - | 70 67 |
| | 364 00 |
| Deduct repairs and taxes, one-third of $68.58, | 22 86 |
| Due *D. S. and wife*, - - - | $341 14 |

Account C :—

| | |
|---|---|
| Amount due *D. S. and wife*, up to February 1842, per letter 3rd March 1842. | $61 65 |
| Rents since received, one-third of $336.50, - | 112 17 |
| | 173 42 |
| Deduct repairs, one-third of $68.58. - | 22 86 |
| Balance due *Sindall and wife*. | $150 56 |

The complainants excepted to accounts B and C; that account B excludes all rents which fell due and were collected by *Dorcas Sparks, more than three years before the filing of the bill.*

That account C, assumes a settlement and full payment between complainants and *Dorcas Sparks,* up to the date of the letter from *Jane Sindall* to the said *Dorcas Sparks,* offered in evidence by the defendants in this cause.

The defendants excepted to accounts A and B. That it allowed the rents for more than three years. That it does not allow taxes and other expenses on the property. That it does not allow for the education of *Jane Sindall.*

To account B, that it allows for three years against the settlement between the parties, and allows nothing for collections to *Mrs. Sparks'* estate, and he again excepts to allowance for dower interest of *Mrs. S.* to complainants, $28.

On the 9th June 1846, the county court, (Le Grand, A. J.,) decreed, that the accounts between the estate of *Thomas Conway* and the trustees, of the 25th May 1844, and 30th May 1846, be ratified, except the allowance to *Mrs. Sparks,* dower interest to the complainants, the amount of which is decreed to the defendant, *J. M. Campbell,* as a part of her estate. That accounts A and B be overruled, and account C ratified, and defendant, *J. M. C.,* as administrator of *D. C.,* pay the same, with interest from 3rd December 1844

From this decree the complainants appealed.

The cause was argued before Dorsey, C. J., Spence, Martin and Frick, J.

By T. P. Scott for the appellants, and
By J. M. Campbell for the appellee.

Frick, J., delivered the opinion of this court.

The bill in this cause, was filed on the equity side of *Baltimore* county court, by *Sindall and wife,* the wife being one of the children and heirs at law of *Thomas Conway,* deceased, against *Dorcas Sparks,* the widow, and *Thomas* and *Catharine,* the other children of the deceased, for a partition and sale

of his real and leasehold estate, and an account and payment of rents. *Conway*, the intestate, died in 1810, and *Dorcas*, the widow, being the administratrix, settled her final account with the orphans court in 1821; "whereby she passed over the title and right of possession to the leasehold, (which was the larger portion of the estate of the deceased,) to the aforesaid distributees of said intestate." The widow, who, in the meantime, intermarried with *Sparks*, (about the year 1816,) previously made a deed of trust, by which she reserved to herself only a life estate in all her property, and gave it in remainder to her three children above mentioned. In 1831, all the parties, at the instance of *Thomas*, joined in a sale and deed of one portion of the property, who received the whole purchase money to his own use, and afterwards executed a deed of release of all his interest and estate, as one of the distributees of his said father, to his sisters *Jane* and *Catharine*, so that at the time of filing the bill, there were but two of the children of said *Conway* interested in the estate. In the course of the proceedings below, the widow died, and *James Campbell* became her administrator, and as such, was made a party in the cause.

On the 31st of August 1842, the daughter and her husband, who were married in 1821, filed their bill against the mother and sister, alleging their possession and receipt, through the whole preceding period, of the rents and profits, and claim, that the mother, who it now appears alone received the rents, is liable to account therefore in a court of equity, as trustee for said *Sindall and wife*.

Upon the answer, a decree for the sale of the property was passed and executed, but it is not necessary for the purposes of this opinion to particularize more than one of the sales, which was of fee simple property, made in the lifetime of the widow, *Dorcas Sparks*. An allowance was made her of one-tenth of the nett proceeds of said sale, in lieu of her dower, to which the complainants assert a right of preference under the equities claimed in the bill, against the said *Campbell*, her administrator.

The answer of the defendants denies, that they refused to complainants their proportion of the rents, although, from the nature of the case, they are unable to bring in any account, except for a few years back; and such account stated between the mother and the complainants, covering three years preceding the date of this proceeding, is accordingly filed. They also produce a letter and account, covering nearly the same period, from *Jane Sindall*, acknowledging the receipt of rents during that time, which the defendants rely upon as a settlement between the parties, and a concession of all claims antecedent to that date. And further, to all claims anterior to the date of that account in April 1839, the defendants rely upon the plea of limitations.

Upon the case presented, we do not feel authorised to regard *Dorcas Sparks*, the appellee, as an intruder, assuming, as a voluntary trustee, the control over the property, and the rents and profits, for which an account is claimed in the proceeding before us. It is impossible to examine the account furnished by *Jane Sindall*, the complainant, admitting, from April 1st, through the years 1839, 1840, 1841, the payment of sums of money monthly, coupled with the expressions in her letter, "it was agreed on, in April 1839, I should receive a part of the rent out of my father's estate," without concluding, that the subject matter to which the agreement refers, had not been left to slumber through the long period intervening from the death of her father, or the settlement of the estate before the orphans court. Whatever disposition was made of the previous rents received, by distribution to the parties, or appropriation by the mother, may fairly be presumed to have been acquiesced in by her. Not the slightest pretext of any preceding outstanding claim is there intimated. In the account rendered with the letter, she states the sum of $61.25 still due to her upon the account; and adds, "if you are willing to settle, send the tax bill and receipt of expenses, and I will pay my share; if you are not, let it stand to be settled with the other property." This letter bears date the 3rd of March 1842, and in the subsequent month of August, the present proceeding for a sale and distribution of the property was instituted To this pro

ceeding, as contemplated by the said *Sindall and wife*, this latter expression must be presumed to refer.

We may here, in support of our views, invoke the deed of trust executed by the mother in 1816, in contemplation of her second marriage, by which all her property, and her interest in the estate of their father, was secured to these children, to take effect after her death; and to the sale in June 1831, by all the parties, of a part of the father's estate, which *Thomas* took in full of his share, and afterwards executed to his two sisters a release of all his interest in the estate. Further we find from the testimony of *Catharine*, that *Jane*, the complainant, lived with her mother, from the period of her father's death, until 1832, although married to *Sindall* in 1824. The mother educated her. She received a good education. She was taught millinery; her mother paid for it. Her mother educated two of her children; one for about six months, and the other for about two years. Such is the testimony of *Catharine Conway;* and moreover, in speaking of her own position at the home of her mother, "she thinks $100 little enough per annum for the board, clothing and education she received."

Does not all this indicate the spirit of concession and amity, in which the widow and children of *Thomas Conway* then acted, in the adjustment of their respective interests in the estate of the deceased? From the accounts stated by the auditor, it would appear, that allowing for taxes and deficient collections, the whole annual amount of the estate was not much over $200; and from the testimony before referred to, we are informed they all lived together, even after *Jane's* marriage, up to the year 1832. That the mother was therefore in the enjoyment of the rents and profits, by mutual consent, for a common advantage, in which all shared, while, under the same roof, is certainly no forced construction of the relations under which they then lived.

And yet this court are required to raise the violent presumption, that the mother was all this time receiving these rents, against the consent of the parties, and, under such construction of misconduct, hold her liable to account as a stranger and intruder.

The case of *Strike and Macdonald*, 2 *H. & G.*, 191, and *Diffenderffer and Winder*, 3 *G. & J.*, 311, have been referred to, and relied on as supporting the complainants' pretensions. But in both those cases, the conduct of the parties was pronounced by the court grossly fraudulent and corrupt in the motive. The possession there being founded in fraud, a strict and rigid responsibility was of course enforced against them. It is true this court, in the case of *Drury vs. Conner*, 1 *H. & G.*, 220, adopt the broad doctrine, that "whoever enters upon the estate of an infant, is considered in equity as entering as guardian for such infants;" "and the infant may, by bill, after he comes of age, recover the rents and profits." But, in that case, it is to be observed, in the application of the doctrine, that the father died, having in his possession slaves belonging to his children. The administratrix took the negroes into possession, and *claimed and held them as her own.* The case of *Dormer vs. Fortescue*, 3 *Atk.*, 130, from which this doctrine of constructive trust is adopted, qualifies it thus: "that where there has been a mere adverse possession, without fraud or concealment, or where there has been any degree of laches on the part of plaintiff, the account shall only be taken from the filing of the bill." There is no allegation in the bill before us, that *Jane* was a minor; nothing in the testimony to shew, that she was not of age in 1821, when the final administration account was settled, or, in 1821, when she was married to *Sindall;* and supposing her infancy before that period, the claim which she and her husband now assert is of nearly twenty years' standing, since the marriage and through the whole time of their coverture.

We have therefore come to the conclusion, that the letter and account from *Jane Sindall,* is the evidence of a settlement at that date between the parties. We have not been unmindful, that in dealing with this document as a settlement, we must assume the concurrence of the husband. And, for the purpose of this decision, we have no difficulty in considering her the agent of *Sindall* in stating the account. It is impossible he should be ignorant of the material facts of his wife's rights, and her claim to share in the property, for the sale of which he is

complainant in the bill. She was in the receipt of money from her mother, monthly, through a period of three years. She acknowledges it by rendering an account, and requires the bills of taxes and repairs, to settle at once, or let them stand over to be settled, under the proposed bill for a sale and distribution. Can it be presumed, that all this was transacting between mother and daughter, without the knowledge of *Sindall?* To assume this, and that she wrote this letter without his privity, would justify the further presumption, that she might have filed the present bill in his name, and without his knowledge and privity—the one is as probable a presumption as the other—and the sister *Catharine*, who lived and was in constant intercourse with complainants throughout the whole period, testifies, that *Sindall* and his wife appeared to be perfectly satisfied, up to the date of the wife's letter to the mother, and never, up to that time, demanded any arrears of rent; but that *Sindall and wife*, both were willing that the mother should receive the rent and divide it. This, she says, took place about five years preceding, which would locate it within the year 1839, the period of the agreement adverted to in *Jane Sindall's* letter, and imply the full concurrence and acquiescence of *David Sindall*, the husband, in that agreement.

That prior to this agreement, some understanding or arrangement prevailed with regard to these rents, to which *Sindall* himself was privy, if not a party, is manifest from the statement in the bill, that in 1831, he, *Sindall*, and his wife, joined with the widow and other children in a sale of a portion of the property, the proceeds of which sale were allotted to *Thomas Conway;* and that *Thomas* afterwards, in 1841, (ten years having elapsed,) executed to *Jane*, the complainant, and *Catharine*, her sister, a release of all his interest, as one of the heirs and distributees of the father. It is further alleged, that when the mother settled the final administration account in the orphans court, "she passed over the title and right of possession of the leasehold estate to the distributees of said *Conway*, deceased;" so that *Jane*, the complainant, had the control of her portion, if she had chosen to assume it. Can it be supposed, that while they were thus parting with the property,

and executing assignments and releases between themselves, and *Sindall* himself a party, that nothing was said or agreed on with reference to the rents that had accrued? With these facts before us, it would be assuming too much to say, that the widow was wrongfully withholding and appropriating them, without the consent and concurrence of both *Sindall and wife*, the complainants in the cause.

In connection with this letter of *Jane Sindall*, it will be perceived, that the testimony of *Catharine Conway* is relied on in support of our views. It is stated upon the return of the commission, that this testimony is excepted to by complainants, and the memorandum to that effect is signed by the commissioner, but not by the solicitor for complainants. We are therefore not called upon to examine her admissibility, or look for the grounds of objection. By the act of 1832, ch. 302, sec. 5, it is provided, that no point relating to the competency of witnesses, or admissibility of evidence, shall be raised in the appellate court, unless it plainly appears by the record, that such point had been raised by exceptions filed in the cause in the court below. This memorandum is not signed by counsel, and is not such an exception as this court here can notice.

The view of the court, that there was between the parties shortly before the filing of the bill, an adjustment of the claim for rents, disposes of the objection, that the plea of limitations, here asserted in behalf of the widow, cannot avail her in bar of a trust. In this view, the plea is out of the case; but, from the importance attached to it in the argument, and as a prominent point in the case, is entitled to the consideration of a few remarks from the court:

Viewed as a bill to account, if there could be an action at law for the same purpose, the statute would be a bar to a suit brought in equity. It is a settled principle, that chancery follows the law; and, acting in obedience to the statute, the plea of limitations is as available in equity as at law, in relation to the same subject. 2 *Gill & J.*, 311.

In all cases of concurrent jurisdiction at law and in equity, the statute is equally obligatory in both courts. 3 *Gill*, 146. 20*th Johns. R.*, 583, *Murray vs. Coster*. Here was a com

plete concurrent remedy at law, and in such case the account will not be sustained in chancery, merely to save the bar of the statute. It was competent to the complainants, on the case made in their bill, to have recovered these rents from time to time, in an action of *indebitatus assumpsit*. And, if having the legal right, instead of resorting to his action for money had and received, the complainant files his bill, the same rule with regard to limitations applies in equity, that would conclude the action at law. Long acquiescence and a lapse of time, therefore, in obedience to the statute of limitations, is a bar to a bill for an account. *Acherly vs. Roe*, 5 *Vezey*, 565, *Perkins' note* (6,) and cases there cited. Thus where one had received the profits of an infant's estate, and after six years had elapsed from his coming of age, the infant brought a bill for account, the court held, that the statute of limitations was a bar to such suit, as it would be to an action at common law. *Daniel's Chancery Pleading and Practice*, 731, cited *Lockey vs. Lockey*. *Prac. in Chancery*, 518. And on this ground, if there remain any doubt of the settlement under the letter of March 3rd 1842, the court think the bar of the statute is conclusive against the complainants.

As regards the amount allowed by the auditor's account to *Dorcas Sparks*, in lieu of dower, the complainants' claim of preference has no foundation. No such priority exists under the rights and equities in their bill. This allowance, in lieu of her dower, made to the widow in her lifetime, devolved, when she died, upon her administrator. The case of *Warfield vs. Banks*, 11 *G. & J.*, 98, is not a parallel case. There one of several joint purchasers paid more than his share, and upon a bill filed for partition, upon sale and distribution of proceeds, he was decreed to be reimbursed his excess. This distribution was between the parties in privity. But here no such equity subsists. The money is part of the estate of *Mrs. Sparks;* and against the creditors of *Mrs. Sparks*, who are represented by *Mr. Campbell*, the administrator, no such lien or priority can be maintained. The complainants, as to what is due to them by the decree of the court below, can receive no more than the share properly arising to them of the assets of the

estate of said *Dorcas Sparks*, dividing the same rateably among the creditors, if insufficient to pay the whole, in due course of administration, the decree of *Baltimore* county court being affirmed.

DECREE AFFIRMED.

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ZACHARIAH MANGUN *vs.* JAMES G. WEBSTER AND JOHN H. BAYNE, ADM'RS OF MARY WILLING.—*December* 1848.

Under the act of 1813, ch. 165, executors and administrators, to whom letters are granted in the *District of Columbia*, may maintain actions, and recover claims, in *Maryland*, as if authorised by the courts of this State.

Copies of their letters testamentary, or of administration, under the seal of the authority granting the same, are sufficient evidence to prove the grant thereof.

The orphans court of *Washington* county, in the *District of Columbia*, being created under a public statute of the *United States*, any judicial tribunal of *Maryland*, acting under the act of 1813, may judicially recognize the seal of the said court, without requiring any proof of its genuineness, or indentity, other than that afforded by the inspection thereof.

Declarations of one of the administrators of an intestate, made after his decease, but before the grant of letters of administration, are not evidence against the intestate's estate; and the fact that such administrator is interested in the distribution of the estate, does not make any difference in the application of the above rule.

The case of *Dent vs. Dent*, 3 *Gill*, 482, is not in conflict with *Davis vs. Calvert*, 5 *G. & J.*, 269.

APPEAL from *Prince George's* county court.

This was an action of *replevin*, brought on the 7th January 1847, by the appellants against the appellee, to recover two negro slaves, *Tom* and *Aaron*, the property of *Mary Willing*, in her lifetime. The appellant pleaded *non cepit*, property in himself, in a stranger, and also limitations. On these pleas issues were joined. The verdict was for the plaintiff.

At the trial of this cause, the plaintiff offered evidence to the jury, tending to prove title in their intestate, *Mary Willing*, to the property in dispute in this cause, and then, by agreement with the defendants, to offer proof of their being administrators, notwithstanding there was no such issue in the cause, they

offered, for the purpose of proving themselves to be administrators of *Mary Willing*, the following paper, to wit:

"UNITED STATES OF AMERICA,

*Washington county, District of Columbia, to wit:*

To all to whom these presents shall come, greeting: Know ye, that on the first day of December, in the year of our Lord 1846, letters of administration of all and singular, the goods, chattels, and credits, which were of *Mary Willing*, late of *Washington* county, *D. C.*, deceased, was, by the orphans court of *Washington* county aforesaid, granted and committed unto *James G. Webster* and *John H. Bayne*, of the county and district aforesaid, they having first entered into bond, with approved securities, for the faithful performance of the duties thereof.

Witness *Nath'l P. Causin, Esq'r*, judge of the orphans court of *Washington* county, *District of Columbia*, this fifth day of December, anno Domini, 1848.

(Seal.)

Test,—ED. N. ROACH, Register of Wills."

But offered no proof of the *seal* of the said orphans court, or of the *signature* of said *Nath'l Pope Causin*, other than the paper imports. The defendant objected to the admissibility and sufficiency of the evidence, for the purpose for which it was offered, but the court, (MAGRUDER, C. J., and CRAIN, A. J.,) overruled the objection, and permitted the evidence to go to the jury. The defendant excepted.

2ND EXCEPTION. After the preceding evidence had been offered to the jury, and which, by agreement, is made part of this, the defendant, to maintain the issues joined on his part, offered to prove to the jury, that since the death of the said *Mary Willing*, and before the grant of the above letters of administration to the plaintiffs, one of them, *James G. Webster*, stated to the witnesses, (in reply to enquiry, what would become of a single daughter of the said deceased,) that he, the said *Webster*, did not know, that every thing depended on *Mr. Mangun*, the defendant, as all the property in *Mr. Willing's* possession belonged to him, the negroes in controversy having been in her possession when she died. The defendant also, at

the same time, offered to prove, that said *Webster* married one of the daughters of the said *Mary Willing*, prior to December session 1842, who is now alive. The plaintiffs objected to the admissibility of such evidence. The court sustained the objection, and rejected all the evidence offered by the defendant. The defendant excepted.

The defendant below prosecuted this appeal.

The cause was argued before Dorsey, C. J., Spence, Martin and Frick, J.

By Tuck for the appellant, and
By T. F. Bowie for the appellees.

Dorsey, C. J., delivered the opinion of this court.

Two bills of exceptions were taken by the appellant on the trial in the court below; the isolated question raised by the first of which was, whether the paper purporting to be the certified copy of the letters of administration, granted to the appellees by the orphans court of *Washington* county, *District of Columbia*, was admissible in evidence to the jury, without its being first proved, that the seal attached to said paper, was the seal of the said orphans court.

By the act of the General Assembly of *Maryland*, passed at December session 1813, ch. 165, persons to whom letters testamentary or of administration were granted in the *District of Columbia*, were authorised "to maintain any suit or action, and to prosecute and recover any claim in this State, in the same manner as if the letters testamentary or of administration had been granted to such person or persons by the proper authority in this State; and the letters testamentary or of administration, or a copy thereof, certified under the seal of the authority granting the same, shall be sufficient evidence to prove the granting thereof, and that the person or persons, as the case may be, hath or have administration."

The orphans court of *Washington* county, in the *District of Columbia*, being created under a public statute, an act of the Congress of the *United States*, it was perfectly competent for any judicial tribunal of *Maryland*, before which

any suit might be prosecuted, in virtue of the above mentioned act of Assembly, judicially to recognise the seal of the said court, without requiring or receiving any proof of its genuineness or identity, other than that afforded by the inspection thereof. See 1 *Greenleaf's Ev., sec.* 503. In respect to the proof of their authority, it was the design of the act of 1813, to place executors and administrators, commissioned in the *District of Columbia*, in precisely the same condition with those possessing like authority under the orphans courts of the several counties of this State. With equal reason, with that relied on by the appellant in this bill of exceptions, might it be insisted, that the courts of law of this State, could not receive in evidence any certified copy of the proceedings of an orphans court of this State, until other evidence of the genuineness of its seal had been offered, than that afforded by the court's inspection of the seal itself.

The only question raised by the second bill of exceptions, was, whether declarations of one of the administrators of the intestate, made after her decease, but before the granting of letters of administration on her estate, were evidence against the appellees in the trial of this cause? The inadmissibility of such testimony had been so recently adjudicated by this court, in the case of *Dent's administratrix vs. Dent*, reported in 3 *Gill's Rep.*, 482, that we felt disposed to regard the point as one no longer open for discussion. But it is insisted on behalf of the appellant, that the decision in the case of *Dent vs. Dent*, is opposed to that made by this court, in the case of *Davis vs. Calvert, et al.*, 5 *Gill & John.*, 269; and has a further discriminating circumstance in it, viz., that at the time of the declarations made by *Webster*, the administrator, he was the husband of one of the daughters, and distributees of the intestate. The latter circumstance gives no additional sanction to the testimony, as it surely could not be contended, that the declarations or admissions made by a distributee, either before or after the granting of letters of administration, are competent testimony against the administrator. The ruinous consequences resulting to creditors and others interested in the intestate's estate, by the admission of such testimony, would, on a mo

ment's reflection, readily present themselves to the mind of any one at all familiar with such subjects.

It is a mistake to suppose there is any contradiction or inconsistency in the opinions of this court, in the cases of *Dent and Dent*, and *Davis and Calvert, et al.* In the latter case, where such declarations were admitted, no letters testamentary or of administration had been granted, and the person against whom his declarations were received, appeared upon the record in the trial of the cause, in precisely the same character in which he had stood at the time the declarations were made by him. There is consequently no analogy between the two cases.

Concurring with the county court in its decisions in both bills of exceptions, its judgment is affirmed.

JUDGMENT AFFIRMED

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THOMAS GIBBONS, EXECUTOR OF MARTHA RILEY, *vs.* ISAAC RILEY AND SARAH NICHOLS.—*December* 1848.

The trust confided to an executor, is defined by his letters testamentary, which is the commission under which he acts.

The acts of Assembly prescribed the mode in detail, in which this trust is to be performed.

An admission in an answer, that two persons jointly purchased a slave, does not prove they were joint tenants. The presumption is, that each paid one-half of the purchase money, and were tenants in common.

In such a case, where one of the purchasers dies, the other is not entitled to the whole by survivorship, but the executor of the deceased must account for the moiety of his testator, as of other portions of his personal estate.

APPEAL from the Orphans court of *Montgomery* county.

On the 17th March 1840, the appellees filed their petition, alleging, that *Martha Riley*, sister of the petitioners, died in the year 1838, having previously disposed of a portion of her estate, by last will, of which the appellant was appointed executor; that *M. R.* owned a very large amount of personal property at the time of her death, over and above that which was disposed of by her will, and of which she died intestate: that

the petitioners and her legal heirs, are entitled to two-ninths of such undisposed part; that the appellant has only accounted for the devised property, and unjustly appropriated the residue of the personal estate of the said *Martha*, to his *own sole use*, and refuses to account for the same. Prayer, for an account, relief, &c.

The answer of the appellant admitted the will, &c.; insisted he had made all the returns, &c., which the law required him to make; and then alleged, he was informed, that the deceased and the appellant's wife held some personal estate, jointly, and, at the time of making his will, the testatrix expressly disclaimed her right to dispose of the same, which is in appellant's possession; and, finally, that he had accounted for all the residue of his testatrix's estate, he was bound by law to account for; that there was, and is, a negro man named *Henry*, who, appellant is informed, and believes, was, many years before appellant's intermarriage with *Mary Riley*, sister of *Martha*, bought by the said *Mary* and *Martha*, jointly, but that *Martha* declared, shortly before her death, she had no right to dispose of him, because he was the joint property of herself and sister, and that, upon the death of the said *Martha*, all her interest in the same survived to the appellant, or to him and his wife, *Mary*.

There was proof of the declaration of *Martha* and *Mary Riley*, that the negro in question, was in partnership between them, and that the witness had hired him from *Martha* shortly before her death.

The orphans court, (Dawson, Magruder and Holland,) decreed, on the 1st December 1847, that the appellant pass a further account of his administration, in which he should be charged with the sum of $187.50, for one-half of the entire value of the negro, at the time of the death of *Martha*, with interest therefrom.

The executor of *Martha Riley* appealed to this court.

The cause was argued before Dorsey, C. J., Stephen, Martin and Frick, J.

By R. J. Bowie for the appellant, and

By McLean for the appellees.

SPENCE, J., delivered the opinion of this court.

In *Maryland*, the trust confided to an executor, is clearly set forth and defined by his letters testamentary, which is the commission under which he acts: "administration of all the goods, chattels and credits, of the deceased, is hereby granted and committed unto," &c.

The act of Assembly of 1798, ch. 101, and the supplements thereto, prescribe the mode in detail in which this trust is to be performed.

For the discharge of this trust, his official oath and bond each make him responsible.

The 20th section of the 8th sub chapter, provides, "that the bare naming of an executor in a will, shall not operate to extinguish any just claim which the deceased had against him, but it shall be the duty of every such executor accepting the trust, to give in such claim in the list of debts. The second section of the same sub chapter, provides, "that the orphans court granting the letters, shall have power to make allowance to any collector, executor or administrator, for property of the deceased which hath perished or been lost, without the fault of the party; and no profit shall be made, and no loss shall be sustained, by an executor or administrator, in the increase or decrease of the estate under his management, but the executor, or administrator, shall return an inventory and account for such increase, and may be allowed for such decrease, on the settlement of the final or other account."

The 12th section of the 14th sub chapter of the act of 1798, provides, "that any executor or administrator shall be entitled to appoint a meeting of the creditors, or of persons entitled to distributive shares or legacies, or a residue, on some day, by the court approved, and passage of claims, payment or distribution may be there made, under the court's direction and control.

The 9th section of the same sub chapter, is in the following language: "Forasmuch as it is the intent of the law now in force, as well as this act, that executors and administrators should suffer no loss from the decrease of the estate, and make

no gain from the increase, and that, when necessary for paying debts, a sale shall take place, and the said executor or administrator be accountable for the amount of the sales," &c.

It is our opinion, that the provisions of the act of 1798, ch. 101, and the uniform practice in this State, even before the passage of that act of making executors responsible for any portion of their testator's estate, not disposed of by their wills, and requiring them to make distribution thereof among the legal representatives of their testator, is conclusive against the executor's claim in this case. Vide *Dep. Com. Guide, p.* 50.

There is no evidence in this cause, that the negro man *Henry*, was owned and held by the testatrix, and *Mary*, her sister, now the wife of this executor, in joint tenancy. The admission in the answer, that *Martha* and *Mary* jointly purchased the negro man *Henry*, does not prove that they were joint tenants. The presumption is, that each of them paid one-half of the purchase money for the negro, and were tenants in common thereof.

The executor is not entitled to the half of *Henry*, as executor, or in right of his wife's survivorship. The decree of the orphans court is affirmed, with costs, and the cause remanded to the orphans court for such proceedings as the case may require.

DECREE AFFIRMED, WITH COSTS, AND CAUSE REMANDED.

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NATHANIEL H. ELLICOTT, JONATHAN ELLICOTT, AND BENJAMIN ELLICOTT, CO-PARTNERS UNDER THE FIRM OF JONATHAN ELLICOTT AND SONS, *vs.* HENRY NICHOLS.—*December* 1848.

*J, N & B*, partners in trade, made their promissory note, payable to *H*, or order: after it was due for more than three years, and after the dissolution of the house, it is not competent for one of the partners to revive the remedy on the note against the three, so as to avoid the plea of limitations.

A plaintiff, who seeks to extricate a case from the act of limitations, must shew a new promise, within three years prior to the institution of the suit, either express or implied.

It is not the mere acknowledgment of a subsisting indebtment which removes the bar. Where a debt is admitted to be due, the law raises a promise to pay it, and it is this new promise, either made in express terms, or deduced from an acknowledgment as a legal implication, which is to be regarded as re-animating the old promise, or as imparting vitality to the remedy, extinct by lapse of time.

From the moment a partnership terminates, the partners becomes distinct persons with respect to each other, and, consequently, one partner can have no power to subject, by his acts or declarations, his former associates to new obligations.

The power of adjusting the unsettled affairs of a partnership, and, as a portion of this authority, the right to collect and pay the outstanding and subsisting debts of the firm, survives the dissolution, as a necessary power; yet, with this qualification, those who formerly were partners, stand to each other, after the dissolution, as if the association had never been formed.

By withdrawing from a joint debtor the protection afforded him by the act of limitations, he is subjected to a new liability. It practically and necessarily imposes upon him a new liability.

The case of *Whitcomb vs. Whiting*, 2 *Doug.*, 652, adopted. Part payment of principal, and payment of interest, before the statute has attached, made by one joint debtor, is a payment by all, and takes the case out of the bar.

A defendant is not benefitted by the part payment of a debt, barred by the act of limitations, when the partial payment is made.

One co-promissor, who pays a debt barred by the act, against the consent of his co-debtor, cannot maintain an action for contribution against such co-debtor.

From an acknowledgment tainted by fraud, the law would infer no new promise.

The case of *Ward vs. Howell*, 5 *H. & J.*, 60, does not decide any thing upon the subject of limitations. The remark of the court on that subject, is a dictum.

Appeal from *Baltimore* county court.

This was an action of *assumpsit*, brought on the 16th January 1844, by the appellee against the appellants. The defendants pleaded *non assumpsit* and limitations, on which issues were joined.

At the trial of this cause, the plaintiff offered in evidence the following promissory note:

"Ellicotts Mills, 5 *Mo. 29th*, 1838.

Twelve months after date, we promise to pay to *Henry Nichols*, thirteen hundred dollars, at six per cent. interest, for value received.

$1300. Jonathan Ellicott & Sons."

At the foot of which was written:

"*Baltimore, May* 18, 1842,—Received from *R. Mickle*, five dollars on account of the above note.

HENRY NICHOLS."

It was admitted that defendants traded under the firm of *Jonathan Ellicott and Sons*, at the date of the note.

The plaintiff also offered in evidence a letter of the plaintiff to *Nathaniel Ellicott*, and his reply thereto, viz:

"B."

"ELLICOTTS MILLS, 2 *Mo. 4th*, 1843.

HENRY NICHOLS,

*Esteemed Friend:*—Your favor of the 31st is received, and, believe me, when I tell you, that there is nothing moves me more, than an appeal to my sense of justice, my humanity, or my sympathy, without ability to afford relief. Was it in my power, in any way, to relieve you, it would give me as much gratification to do so, as you to receive it. Until the failure of *Jonathan Ellicott and Sons*, I believe they always paid to the uttermost farthing, and the poor or the needy was never turned empty away; and when they assigned their whole property for the payment of their debts, it was thought, that it would much more than do it, but such has been the disasters of the times, I have been as much disappointed as you, or any other person can be. I regret, that you did not purchase property for the amount of your claim; this you had the right and privilege of doing, and, in this way, the whole value of your claim would have been secured to you, dollar for dollar. *Benjamin H. Ellicott* and *Robert Mickle*, are the two trustees of the estate of *Jonathan Ellicott and Sons*, and they are the only parties that have had any thing to do with its settlement; all right and title, and control, at the assignment, having passed from me. Not having earned any money, but lost much, since the failure, I have been reduced to live by the kindness of my wife's connections, and, without them, should have been as destitute as you are, and, were it in my power to do so, I have the heart and the feelings to share their bounty with you. I do not see how I could accomplish any thing in the way of relief among

the creditors; had I myself the ability, nothing would afford me more sincere gratification.

I am your friend sincerely, N. H. Ellicott."

"Henry Nichols, *Darns Town, Md.*"

"C."

"Seneca Mills, *Jan'y* 31*st*, 1843.

*Dr. Sir:*—I am compelled again to ask the favor of you, to try and help me; you have the advantage of me by law, but I trust not by conscience; you have had my labor for several years, and that of the hardest kind; night and day have I labored to save something for myself, and entrusted it to you, and now to be put off without one cent, is a matter to be better imagined, than of real feeling. Sir, will you put me off in this way, without trying to relieve me at all? you have friends and influence, will you treat me with cold indifference, and not try to help me? If you will only ask your creditors, I have no doubt but they would, with your influence, let me have something, as they have had the advantage of the law. I think, the justice of my case will not let them rob me with a clear conscience. If you will only do for me what you can, I will be perfectly satisfied; I am sure you could, if you would, do something. I am not worth one dollar now myself, in reality, but I think, if I owed you the amount of my note, I would pay it, if it was only one dollar at a time; if you was in my situation, it would give me pleasure to do it for you, even should I want myself, though I will not ask you to suffer for me, I only ask your influence with your friends, to help me, as I must suffer, by placing more confidence in men than they deserve.

Yours very respectfully, Henry Nichols."

"Mr. Nath'l H. Ellicott, *Ellicotts Mills.*"

The plaintiff further proved by *Mrs. Nichols*, that four years ago last fall, (1842,) she called upon *Mr. Nathaniel Ellicott*, one of the defendants, at the request of the plaintiff, about the money due to him, and to see if she could get thirty dollars from him; that she spoke to *Mr. Ellicott* all about the money, and how it was claimed by her brother, the plaintiff; he did not deny that he owed the money; said he was agent for *Mr*

*Carroll* in the big mill; that he was dependent on his salary; that he was sorry for *Mr. Nichols*, and spoke very feelingly, but said he could do nothing for him, he was only one of the firm; he did not deny that the debt was due; did not admit it; said that plaintiff ought to have his money; said that he was poor; did not deny that the debt was due, and did not admit that it was. He did not admit or deny, that he or the firm was, at the time of the conversation, indebted to the plaintiff; he said nothing about that; said he was poor, and but one of the firm, and expressed a great deal of pity for the plaintiff. He said, he, *(Nichols,)* ought to have his money. He never denied he owed the money, and said that he ought to be paid. He never denied any assertion she made. Witness said the money was the hard earnings of his life, and asked *Ellicott* if he could do any thing for him? He said he was but one of the firm, that he was sorry for him; he never denied what she said, or said that the debt had been satisfied or paid.

The plaintiff then offered in evidence the following entry, in the schedule of *Jonathan Ellicott and Sons*, made to their creditors in May 1839.

"*Jonathan Ellicott and Sons*' note to *Henry Nichols*, for $1300."

The defendants then offered in evidence a release, dated 27th May 1839, from their creditors, (including the plaintiff,) reciting their inability to pay promptly all their debts, their desire of obtaining a discharge and release from all their creditors, upon assigning their property in trust for their benefit, their making such proposals to their creditors, the acceptance thereof by them; and that the said creditors, in consideration thereof, respectively release, &c., the said *J. E. and Sons*, from all contingent liabilities contracted severally with them, as well as from all claims, debts, due and to become due, from the said *J. E. & S.* to them; that if *J. E. & S.* fail to execute such deed of trust within sixty days, or if the said *J. E. and Sons* fail, within said sixty days, to obtain a release from all their creditors, then, in either event, the release to be void. This instrument was sealed by a great number of creditors.

The defendants also gave in evidence a deed of trust, of 19th July 1839, from them to *Robert Mickle*, as trustee, and that their co-partnership was dissolved on the 26th July 1839, by mutual consent, and public notice given thereof by advertisement, but offered no evidence, that the newspapers in which the notice was published, were taken or seen by the plaintiff.

The plaintiff then further offered in evidence by *William Ross*, that *Hopkins and Brothers* had a draft on *Ellicott and Sons*, and by them accepted, and the following entry, in the books of *Hopkins and Brothers*, and proved that it was in the handwriting of a deceased clerk of said last mentioned firm.

"*Geo. R. Peak's* draft on *J. Ellicott and Sons*, due May 13th, 16th, 1839, for $400, compromised and settled with *J. Ellicott and Sons*, on the 29th June 1840, for $300, or seventy-five cents in the dollar, exclusive of interest." The plaintiff further proved by *Beale Howard*, one of the creditors of *Jonathan Ellicott and Sons*, that he executed the release to them, but not before he obtained the amount of his claim, without interest; could not say at what time the money was paid to him, but that he thought it was about a month before he purchased some lots from *Mr. Mickle*, the trustee; that the deed from the trustee was given on the 18th January 1840, but that an agreement for the purchase was made previous to that time. *Howard* further stated, that he did not receive the money for his claim from either of the members of the firm of *Jonathan Ellicott and Sons*, but that both *Nathaniel* and *Benjamin Ellicott* told him, to take his notes to a gentleman in *Baltimore*, who would give him the money for them. Witness did not recollect the name of the gentleman, but he got his money from him; *Benjamin Ellicott* taking him to the store, and pointing to it as the place he was to be paid.

The defendants then further proved by *Mr. Mickle*, that he had seen the plaintiff in this cause, who called upon him to enquire what was the condition of the trust property, how much he was likely to get for his claim, and when it would be settled; that on the 18th May 1842, plaintiff called upon him, and with the note upon which this action is brought when witness paid him five dollars upon it, and took his receipt at the bottom of the note.

The defendants further proved by the same witness, that he advertised the mills, being a part of the trust property, for sale, in the fall of 1839, and again in 1840, and proceeded openly in a full execution of the duties of the trust; that he sold property, and distributed the proceeds of sale under the trust deed, and conveyed the unimproved property for the claims of the firm of *Jonathan Ellicott and Sons*, and that during all this time, the plaintiff never informed him, that he objected to the release or the deed of trust, or that he meant to impeach either the one or the other.

The defendants further gave in evidence the two letters from *C. Smith* to *R. Mickle*, viz:

"I."

GEO. TOWN, *May 23rd*, 1842.

*Dear Sir*:—At the request of *Mr. Henry Nichols*, I address you with reference to a note in his favor, drawn by *Jonathan Ellicott and Sons*, due some two years since, and which he placed in your hands, when he was in *Baltimore*, as security for money advanced by you to him. His object is to realise something at once from the note, however small, and he has authorised me to sell it, if a purchaser could be found, at twenty cents on the dollar, rather than wait longer. You will confer a great favor, if you would advise me what the prospect is of finding a purchaser, and if not in your power to dispose of it, what probability there is of an early settlement of the concerns of the estate.

*Mr. N.* is much in want of money, and would be glad to hear through me, as soon as it may suit your convenience.

I am very respectfully, your ob't serv't,

C. SMITH."

"J."

"GEO. TOWN, *July 11th*, 1842.

R. MICKLE, ESQ'R.

*Dr. Sir*:—Your favor of the 13th, enclosing note of *J. Ellicott and Sons*, in favor of *H. Nichols*, for $1300, was received by me this morning. I have not actually concluded a sale of the note, but have partially arranged for the purchase

of mill stones from *Mr. Duvall*, who thinks he can avail of the note at thirty cents.

I remain your very ob't serv't,

C. SMITH."

Also a letter from plaintiff to *R. Mickle.*

"H."

"SENECA MILLS, *January 29th*, 1843.

*Dear Sir*:—I take this opportunity to know of you, whether there is any chance of getting any thing for my note of the *Mr. Ellicotts*. I am hard pressed, and not able to labor as I have done, to make the money that I placed in the hands of *N. G. Ellicott* for safe keeping—which he promised to return to me at any time that I should want it, and in less than twelve months I was told that it was placed in the firm of *Ellicotts*, and I could not get it; that they had given up all their property, and appointed you their trustee, but would insure one-half to be safe:—now I understand that there are preferred claims that will take all—this is hard, if fair, as those preferred claims surely get my labor, as well as the other property, and this money I labored hard night and day for, and made it all by strict honesty, which I have no doubt you have already understood from *Margaret H. Weling*, and *Mr. Ellicotts* also—and I now ask the favor of you to lay my case before the creditors, and they, I hope, will allow me some assistance, as it is but a small sum, and their's so large that they would never miss it; and it would at this time relieve me very much; and I hope you will help me also, if it should be but little it will do me some good—or advise me what to do.

I remain yours, very respectfully.

HENRY NICHOLS."

The defendants further proved by said witness, that the claims against the firm of *Jonathan Ellicott & Sons*, sold as high as eighty per cent. at first; that was the highest price. Some for seventy-five, sixty, and he knew of the sales of $30,000 of claims selling at sixty-six cents in the dollar. In answer to a question on the part of the plaintiff's counsel, the same witness answered, that he knew about the concerns of the *Ellicotts;* had heard some of the creditors made objec

tions to sign the release; but he never was informed by *Benjamin H. Ellicott*, that he could recollect, that he had to give creditors money to sign, or that he employed *Vickers*, or any one else, to give it for him; some of the creditors who wanted the arrangement carried out, he believed, did give something to procure the signature of an unwilling creditor; he thinks this was done by *Ellicott & Brothers*, as they were anxious to have the arrangement carried out.

The plaintiffs then proved by *Mr. Wilson*, that he acted for *Mrs. Treakle*, one of the creditors of *J. Ellicott & Sons*, and that he refused, for him, to execute the release, without getting the principal of her claim; that she obtained this, he thinks, some six months after the date of the release, when her name was affixed; that he does not recollect who paid the money, but thinks he received it in a check from *Mr. Vickers*.

The defendants then, further to prove the issue on their side, proved by *Mr. Mickle* that he was not the agent of *Jonathan Ellicott & Sons*, or acted for them in any other character than as trustee, under the deed of trust; that *Nichols* called on witness and enquired what was the condition of the trust fund, and when the note, which he then presented to me, (which is the same sued on in this action,) would be paid? I told him there were liens on the lands, being preferred claims, which were to be paid off first. Told him that sales of trust property had been made, and gave him a general statement of the condition of the trust property, and that I was not prepared to make a dividend upon his note. The creditors of *J. E. & Sons*, generally, called upon him in regard to trust property, and about their debts; that plaintiff called, as they had, on me, telling him that I could make no dividend on his note; plaintiff then said he had no money to go home, and asked me to let him have five dollars to take him home, and that I might hold the note as security. The above statement is made by me, as an impression upon my recollection of the substance of what took place between *Nichols* and myself, on the day the note was presented. I have not a distinct recollection of the words used, either by myself or *Nichols*. When I first heard of this suit my recollection recurred to the conversation, and the call

upon me by *Nichols*, above stated. I have never before heard of it, and was surprised, knowing that his paper was on the release, and recollecting that he had said nothing to me about recurring to the personal liability of *Jonathan Ellicott & Sons*.

Whereupon the plaintiff prayed the court to instruct the jury:

If the jury believe that the defendants in this cause were partners in trade, on the day upon which the note sued upon was made, and that said note was signed by them, and that said *Nichols* wrote to one of the defendants the following letter, (*see* letter marked C, ante, 88,) to which said defendants wrote the following answer, (*see* letter B, ante, 87;) and if the jury further find, that in the fall of 1842, *Ann Nichols*, by direction of plaintiff, called upon said *J. Ellicott*, the defendant, and stated to him that the note now sued upon was for money lent to defendants, and was the hard earnings of his life of labor, and that *Nathaniel Ellicott*, in reply to such observations, said, that *Nichols'* was a hard case, he was sorry for him, he was but one of three partners, he could do nothing for him, he was poor and living on a salary; and, also, that he, *Nichols*, ought to be paid; and, also, from the letter written by *Nichols* to *Mickle*, given in evidence by the defendant, then there is evidence from which the jury can find, that said claim is not barred by limitations, although the firm of *J. Ellicott & Sons* was dissolved in July 1839.

2nd. If the jury believe the facts stated in the foregoing prayer, and if they further find that several of the creditors of *J. Ellicott & Sons*, did not sign their release within the time prescribed therein, but afterwards were paid their whole, or nearly their whole debts, to induce them to sign the same, that such release is no bar to this suit.

3rd. If the jury believe the facts stated in the plaintiff's first prayer, then the evidence takes the case out of the statute of limitations.

The defendants then prayed the court to instruct the jury:

1st. That if the jury believe from the testimony, that the plaintiff executed the release, as given in evidence; that he called upon the trustee as one of the creditors of *Jonathan*

*Ellicott & Sons*, and presented his claim to him to be paid out of the trust funds; or if the jury believe that the trust property was advertised and sold, and the proceeds of sale distributed under the trust deed, also given in evidence by defendants, and the property therein mentioned, or portions of it, sold and deeded to creditors and others, in pursuance of the provisions thereof, and if the jury further believe, that, all this while, the plaintiff stood by and permitted the full execution of said trust by *Mr. Mickle*, and acquiesced therein, and never gave notice to him, or to the defendants, until the institution of the suit in this case, that he meant to assail said release on the ground, that it was not executed in time, or that money was paid to some of the creditors for their signatures, then the said plaintiff is estopped from taking these objections now.

2nd. If the jury find from the evidence, that some of the creditors who signed the release, did so after the period prescribed for the execution thereof, this does not, of itself, invalidate the release, and render it void as to all or any of the signing creditors: provided they shall further find, that the said deed of trust was executed within the time, and in the manner prescribed in said release.

3rd. That there is no evidence from which the jury can infer, that any one of the members of the firm of *J. E. & Sons*, by secret bargain, paid any money to the creditors signing the release, for their signature thereto.

4th. If the jury find that *J. E. & Sons*, or any creditor, anxious to have the arrangement proffered to their creditors, carried out, did pay, or agree to pay, or to secure to one or two of the signing creditors, the principal of their debt, or seventy five per cent. on the amount thereof, such payment or agreement to pay or secure, does render the release null and void, at the option of any of the signing creditors: provided they find that the deed was executed, as provided for by said release.

5th. That said release cannot be impeached for any fraud proved in this case, at law, and in this court.

6th. That the provision in said release, that it should be executed within the time prescribed therein, and that unless executed by all the creditors within the time limited it should be

void, is a provision for the benefit of the defendants, which it was competent for them to waive; that they did waive it by executing the deed of trust, as stated in the evidence, if the jury believe it, and that in so waiving said provision, and executing said deed, the signing creditors obtained the same full and entire benefit thereof, as if every creditor had signed the release without any thing paid them, and within the limits of the time prescribed therein, and that, therefore, the plaintiff, as one of the signing creditors, cannot avoid said release on the ground, that it was not executed in time, or that money was paid to some of the creditors for signing it.

7th. That it is the province of the court authoritatively to interpret the letter of plaintiff to *Nathaniel Ellicott*, and his reply; and that these papers do not take the plaintiff's claim out of the bar of the statute of limitations.

8th. That no sufficient acknowledgment of a subsisting debt, at the time the acknowledgment was made, to prevent the bar of the statute of limitations to plaintiff's demand, has been proved in this case, although the jury may believe the testimony of *Mrs. Nichols.*

9th. If the jury believe that the partnership of *Jonathan Ellicott & Sons*, was dissolved in the manner stated in the proof; and that subsequent thereto, the conversation proved by *Mrs. Nichols*, took place with *Nathaniel Ellicott*, nothing that he said, can revive the plaintiff's demand, as against the other defendants in this cause.

The court, (Le Grand, A. J.,) granted the prayers of the plaintiff, and refused those of the defendants, who thereupon excepted, and appealed to this court.

The cause was argued before Dorsey, C. J., Spence, Martin and Frick, J.

By Dulany and McMahon for appellants,
By W. H. G. Dorsey and R. Johnson, for appellees.

Martin, J, delivered the opinion of this court

In this case an action of *assumpsit* was instituted in *Baltimore* county court, by the appellee against the appellants, as

partners, trading under the name of *Jonathan Ellicott and Sons*, for the recovery of a promissory note, given by the firm to the appellee, on the 29th of May 1838.

The appellant pleaded *non assumpsit*, and the statute of limitations, and it appears from the record, that the plaintiff at the trial below, to relieve the case from the operation of the bar, created by the act of limitations, relied, mainly, upon the letter of *Nathaniel Ellicott*, of the 4th February 1843, and upon the admissions and assumptions, supposed to have been made by the said *Ellicott* with respect to this debt, in a conversation held with *Mrs. Anne Nicholls*, in the autumn of 1842.

It appears from the testimony exhibited in the bill of exceptions, that the firm of *Jonathan Ellicott and Sons*, was dissolved on the 9th of July 1839, and that *Benjamin H. Ellicott*, one of the partners, was empowered to collect the assets, and settle up the business of the partnership; and the dissolution of the firm, and the selection of *Benjamin H. Ellicott*, as an agent, to wind up the concerns of the house, was, on the same day, communicated to the public through the medium of the *Baltimore* newspapers.

The promissory note in controversy, was drawn by the appellants on the 29th of May 1838, payable twelve months after date; and it therefore appears, that the admissions relied on by the appellee, to take this case out of the statute of limitations, were made not only after a dissolution of the partnership, but after the statute had attached to the claim. And in this posture of the case, the counsel for the appellants have contended, that *Nathaniel Ellicott* had, at that period, no power to bind his former co-partners, by his acknowledgments and promises, so as to deprive them of the defence of the statute of limitations. Upon the point thus presented for the consideration of the court, there has been, as on almost every question connected with the statute of limitations, a most embarrassing conflict of judicial opinions; but after a careful examination of the prominent cases bearing upon this subject, we have reached the conclusion, that the proposition advanced by the counsel for appellants is correct, and that on this ground the judgment of the court

below must be reversed. We proceed to state the reasons by which we have been conducted to this conclusion.

In the case of *Duval against Peach*, decided in 1843, 1 *Gill*, 172, the defendant relied on the statute of limitations, and asked the court to instruct the jury:

"That if the jury should find from the evidence, that the agreement was made, and the purchase money paid on the 30th of December 1826, and that the original writ in this cause did not issue until the 1st of March 1840, that then this action was barred by limitations, *unless they should find some subsequent assumption or promise by the defendant, either to repay the money, or perform the contract.*"

The county court granted this prayer. The action of the court below was ratified by this court, and they announce the principle:

"That in *Maryland*, to remove the bar raised by the statute of limitations, there must be such an acknowledgment of a subsisting debt, as is equivalent to an express or implied assumpsit or promise to pay."

In the case of *Frey against Kirk*, decided in 1832, 4 *G. & John.*, 509, the statute of limitations was pleaded. It was proved at the trial, that the defendant admitted the debt was due, but said "the plaintiff might save himself the trouble of suing him, as he had taken the benefit of the insolvent laws." The discharge under the insolvent laws, to which he referred, imparted to him, in fact, no protection. But the statement was held insufficient to remove the bar; and the court said:

"Every acknowledgment to take a case out of the statute, should be of such a character, as that an implied promise may arise therefrom."

We consider it, therefore, perfectly clear, in accordance with the principles enunciated in the cases to which we have just adverted, that a plaintiff who seeks to extricate a case from the operation of the statute, must show a new promise within three years prior to the institution of the suit, either express or implied. It is not the mere acknowledgment of a subsisting indebtment which removes the bar. Where a debt is admitted to be due, the law raises a promise to pay it. And it is this

new promise, either made in express terms, or deduced from an acknowledgment, as a legal implication, which is to be regarded as re-animating the old promise, or, as imparting vitality to the remedy, which, by lapse of time, had become extinct, and thus enabling the creditor to recover upon his original contract.

In the case of *Little against Blunt*, 9 *Pick.*, 492, the court said:

"If the debt remained, the remedy was gone, and there was no subsisting cause of action. The new promise, therefore, is a new cause of action; for without it there was no cause of action. * * * * * * But it is not necessary to declare upon the new promise. According to the established rules of pleading, the plaintiff had the right to declare on the original promise, and when the statute of limitations was pleaded, he might reply the new promise. When the pleadings assume this shape, the original promise is, apparently, the cause of action, but it is the new promise alone that gives it vitality; and that, substantially, is the cause of action."

In the case of *Keplinger against Griffith*, decided in 1830, 2 *Gill and Johnson*, 296, and recently recognised by this court, as authoritative, in the case of *Cross vs. Carter*, the Court of Appeals say:

"It was ruled by this court in *Oliver vs. Grey*, 1 *Harr. and Gill*, 204, that the acknowledgment of the debt, with a naked refusal to pay, or a refusal accompanied with an excuse, for not paying it, which, in itself, implies an admission that the debt remains due, and furnishes no real objection to the payment of it, is sufficient to take a case out of the statute of limitations;" and it has been supposed that the rule thus stated, is incompatible with the proposition announced by this court in *Frey against Kirk*, and *Duval against Peach*, that to take a case out of the statute, there must be a new promise, either express or implied. We do not think so."

The principle embodied in the *fourth* resolution, in *Oliver vs. Grey*, was probably transferred to that case, from the case of *Swan against Sewell*, 2 *Bar. and Ald.*, 761, where *Bayley, Justice*, said:

"The question, in these cases, always is, whether the admission, where no express promise to pay is made, be sufficient for the law to raise from it an implied promise. If a party admits a debt, and does not say that it is satisfied, and refuses to pay it, alleging, at the same time, an insufficient excuse for not paying it, the law will, in these cases, raise an implied promise to pay the debt then acknowledged to be due."

And we consider the doctrine announced in *Oliver vs. Gray*, in *Keplinger vs. Griffith, and in Swan against Sowell*, as the mere enunciation of the principle, that if a party admits a debt to be due, but at the same time refuses to pay it, upon insufficient grounds, the law will raise a promise to pay it, *in invitum*, and against the will of the debtor. But so far from enfeebling, it fortifies the position, that nothing less than a new *assumpsit*, express or implied, will be sufficient to remove the bar interposed by the statute of limitations, after it has once operated upon the demand.

We have seen that the partnership of the appellants was regularly dissolved on the 9th of July 1839, more than three years anterior to the period when these alleged acknowledgments were supposed to have been made by a member of the firm; and the doctrine upon this subject is fundamental, that from the moment the partnership terminates, the partners become distinct persons with respect to each other, and that consequently, one partner can have no power to subject, by his acts or declarations, his former associates, to new obligations, burdens or responsibilities.

In 3 *Kent's Com.*, 62, it is said:

"The power of one partner to bind the firm, ceases immediately on its dissolution, provided the dissolution be occasioned by death, or bankruptcy, or by operation of law; though in cases of voluntary dissolution, notice is necessary, to prevent imposition on third persons, who might continue to deal with the firm. The partners from that time become distinct persons, and tenants in common of the joint stock. One partner cannot impose new obligations on the firm, or vary the form or character of those already existing."

In *Bell vs Morrison*, 1 *Pet.*, 370, *Mr. Justice Story*, when speaking upon this subject, says:

"By the general law of partnership, the act of each partner during the continuance of the partnership, and within the scope of its objects, binds all the others. It is considered the act of each and of all, resulting from a general and mutual delegation of authority. Each partner may, therefore, bind the firm by his contracts, in the partnership business; but he cannot bind it by any contract beyond those limits. A dissolution puts an end to the authority. By force of its terms it operates as a revocation of all power to create new contracts; and the rights of partners, as such, can extend no further, than to settle the partnership concerns already existing, and to distribute the remaining funds."

It is unnecessary to cumulate authorities upon this familiar subject. The principle is fully established, that the power of adjusting the unsettled affairs of the partnership, and as a portion of this authority, the right to collect and pay the outstanding and subsisting debts of the firm, survives the dissolution, as a necessary power, liable as all partnerships are, to arbitrary and sudden terminations; yet with this qualification, and subject to this exception, those who formerly were partners, stand to each other, after the dissolution, as if the association had never been formed.

The promissory note, which forms the subject of the present dispute, was a firm debt, drawn by the appellants during the continuance of their partnership, and for the payment of which, they were therefore originally responsible, *in solido*. This is conceded. But the counsel for the appellants have insisted, that the defendants were exonerated from their original responsibility, for this demand, by force of the statutory bar, in June 1842, and that they cannot be deprived of the protection afforded by the statute, and subjected to a new liability, with respect to this debt, by the acknowledgments and promises of a former partner, made subsequent to the dissolution of the partnership, and after the action of the statute upon the claim had been fully consummated.

In the case of *Atkins against Tredgold*, 2 *Bar. and Cres.*, 23, *Bayley*, *Justice*, said :

"Here the statute appears to have attached, before the payment was made by *Robert Tredgold*, and therefore *John Tredgold*, being at that time protected, could not be subjected to *any new obligation* by the act of *Robert*."

In the case of *Sigourney against Drury*, 14 *Pick.*, 391, the court discriminate between a part payment by one of several promissors of a note, within the legal period, and a payment after the statute has attached; and say :

"We consider it a material circumstance, that the payment was made before the statute took effect, and do not mean to give any opinion, as to the effect of payment of interest or principal by one, to affect the liability of others, after the parties are, in fact, exonerated by lapse of time, and the operation of the statute. There is an obvious difference between the effect of a payment within the term, which shall continue an existing liability in force, and such payment made after the liability is barred, to revive and create a new liability."

The cases to which we have just referred, recognise the proposition, that by withdrawing from a joint debtor the protection afforded him by the statute, you subject him to a *new* liability, and it is this principle which is conclusive against the attempt of the plaintiff in this cause, to revive the action against the appellants, by the acknowledgments of *Nathaniel Ellicott*.

After the statute of limitations has operated upon a claim, it is supposed, in the eye of the law, to have been satisfied. Those who formerly occupied the position of joint debtors, covered by a common obligation, no longer stand in that relation to the creditor, or to each other. There is no means of enforcing against them, the *barred* demand. The act, promise, or acknowledgment, which deprives the parties, thus situated, of the benefit of the statute, and subjects them to the payment of a debt from which they were exonerated, practically and necessarily imposes upon them a new liability. And it is perfectly immaterial whether this is accomplished by considering the new *assumpsit*, as creating an independent and substantive cause of action, upon which the creditor must specially declare, or as

restoring vitality and vigor to the remedy, which, by lapse of time had become powerless and useless.

The power thus to implicate and bind the firm, is not to be considered as remaining in any one of the partners, after the expiration of the partnership. It would be a solecism to affirm, that the continuing power to adjust outstanding and subsisting debts, which we have seen survives the dissolution of the partnership, carries with it, as incidental, the authority to revive, as against others, a demand, which, in legal contemplation, is presumed to have been paid, and which is not to be regarded as a subsisting debt, until it has been made so by a new promise.

The authorities upon this branch of the law, are numerous and contradictory, and it is proposed only, to examine a few of the leading cases, relied upon by those who maintain, that an acknowledgment of a subsisting indebtment, by one co-promissor or partner, will remove the bar with respect to the others, even after the statute has operated upon the claim.

The leading case on this subject, and upon the authority of which the more modern cases of *Perham vs. Raynal*, 2 *Bing.*, 306, and *Burleigh vs. Scott*, 8 *B. & Cres.*, 36, were determined, is that of *Whitcomb against Whiting*, 2 *Dougl.*, 652, decided in the *King's Bench* in 1781.

It was an action on a joint and several promissory note, executed by the defendant and several others. The defendant pleaded the statute of limitations, on which issue was joined. At the trial, the plaintiff established the note, and, to take the case out of the statute, proved payment of interest, and part of the principal, by one of the other parties to the note, within six years. Upon this evidence there was a verdict for the plaintiff.

*Lord Mansfield*, on discharging the rule for a new trial, said:

"The question here is, only, whether the action is barred by the statute of limitations? When cases of fraud appear, they will be determined by their own circumstances. The payment by one is payment for all, the one acting virtually for the rest; and in the same manner, an admission by one is an admission by all, and the law raises the promise to pay, when the debt is admitted to be due."

The correctness of this decision has been sometimes questioned in *England*, notwithstanding the commanding influence of the name of *Lord Mansfield* in *Westminster Hall*. But, we think, without just case. The vindication of the opinion is to be found in the explanation given to it, by *Mr. Justice Bayley*, in *Atkins against Tredgold*, 2 *Bar. and Cres.*, 23, that the part payment of the principal, and the payment of the interest, relied on to take the case out of the bar, was made within the legal term, and before the statute had attached. Until the statute had barred the demand, the promissors were subjected to a joint and common responsibility; and under such circumstances it might well be maintained, that a payment made by one of the parties to the note, was a payment made for the benefit of all. *Willes, J.*, therefore properly remarked:

"That the defendant had the benefit of the partial payment, and must therefore be bound by it."

In the case of *Brandham against Wharton*, 1 *Bar. and Ald.*, 468, *Lord Ellenborough*, after repudiating the authority of *Jackson vs. Fairbank*, 2 *Hy. Blac.*, 340, says, with respect to the case of *Whitcomb vs. Whiting*, 2 *Dougl.*, 652:

"That the acknowledgment was not, indeed, by the party himself, but by one of the parties *bound*, and who could be called upon for contribution."

Can it be affirmed, that a defendant is benefited by the payment of a debt which he has not admitted to be due, and which, in law, he is under no obligation to pay? Or that one co-promissor who pays a debt barred by the statute, against the consent of his co-debtor, can maintain against him an action for contribution? We think not.

Upon this point, *Mr. Justice Story*, in a note to his *Treatise on Partnership*, *sec.* 323, says:

"It is not correct to assert, that payment by one partner, after a dissolution, of any debt, as a supposed partnership debt, binds the other partners. They have the right to say, that it never was, or was not at the time of the payment, an existing partnership debt. Suppose it had been already paid, or extinguished, how is the partner liable to pay it again. It is assuming the very point in controversy, to insist that a debt, once

barred by the statute of limitations, is not extinguished, if voluntarily revived by the acknowledgment of one of the partners."

In *Peaselee vs. Breed*, 10 *New Hamp. Rep.*, 48, the action for contribution was sustained upon the circumstances of the case. But the court say:

"Had it appeared that *Peaselee* was at any time discharged by the operation of the statute of limitations, and that he, or his administrator, after that, refused to avail himself of the defence, and *voluntarily* paid money which he could not at the time have been compelled to pay, it would have presented a very different question."

We infer, therefore, from the remarks of *Willes, Justice*, in 2 *Dougl.*, 652; from the reasoning of *Lord Ellenborough*, in *Brandham vs. Wharton;* and from what was announced by *Mr. Justice Bayley*, in *Atkins vs. Tredgold*, that the decision in *Whitcomb vs. Whiting*, rested upon the fact, that at the period when the partial payment was made, the statute of limitations had not acted upon the demand, and that there was therefore, with respect to the debt, a continuing joint liability. It is upon this hypothesis alone, that one of the joint debtors could be considered as virtually the agent of the others.

In the case of *Pease against Hirst*, decided in 1829, 10 *Bar. and Cres.*, 122, it appeared, that interest on the note had been paid annually by *Hirst*, one of the makers. The statute of limitations never attached. And it was held that it was not a bar, as interest had been paid on the debt within six years, by one of the four persons jointly liable.

In the case of *Channell against Ditchburn*, decided in the *Court of Exchequer*, in 1839, 5 *Mees and Wel.*, 491, it was held:

"That payment of interest by one of the makers of a joint and several promissory note, though made more than six years after it became due, was sufficient to take the case out of the statute of limitations, as against the other maker."

*Parker, Baron*, so ruled, but observed:

"That it does seem a strange thing to say, that where a person has entered into a joint and several promissory note with

another person, he thereby makes that other his agent, with authority, by acknowledgment or payment of interest, to enter into a *new contract* for him."

With regard to this case, it may be said, that if the doctrine announced by the court be correct, the counsel for the appellants were warranted in invoking it, as an authority on the side of the proposition for which they contend. For the principle is established in the law of partnership, that after the dissolution of the firm, one partner cannot bind his co-partners by a *new* contract.

But we apprehend, that the error of the learned Baron consisted in his not discriminating between a payment of interest, made before and after the statute had attached. In the former case, a payment by one of the makers of a promissory note, might be regarded as a payment by all, because at the time of the payment, the parties were jointly liable for the debt, and one might therefore be considered as the agent of the other, with respect to the debt.

The condition and relation of the parties is changed, as soon as the bar of the statute has become complete. They are no longer bound for the debt. It is impossible to maintain, that a partner or maker of a promissory note, is, in law, liable for the claim after the statute of limitations has operated upon it. He may become responsible, but it is by force of a new promise.

It was the opinion of *Lord Tenterden*, in *Martin and Bridges vs. Elmore*, 3 *Car. and Paine*, 83:

That the acknowledgment made by a partner, who was not himself liable at the time when he made it, was not sufficient to take the case out of the statute of limitations, so as to charge his co-partner.

The case of *Goddard vs. Ingram and Wartnaby*, decided in the *Queen's Bench*, in 1842, 3 *Gale and David.*, 46, was cited by the counsel for the appellee.

It was there held, that a payment made by one partner, after the dissolution of the partnership, on account of a partnership debt, and after six years had elapsed, without any acknowledgment of the debt, was sufficient to take the case out of the

statute of limitations, as against the other partner, though the jury found that the payment was fraudulently made, against his consent, and in concert with the creditor, to revive the debt. And it must be conceded, if that case could be regarded as authoritative, it would be conclusive upon the point now under consideration.

But we cannot recognise the ruling of *Lord Denman*, as containing the correct doctrine upon this subject.

In *Whitcomb vs. Whiting*, *Lord Mansfield* anticipated a case like this, and said, when cases of fraud appear they will be determined by their own circumstances. And certainly the legal proposition is perfectly clear, that from an acknowledgment tainted and vitiated by fraud, the law would infer no promise.

We have examined the record in *Ward against Howell*, reported in 5 *Harr. and John.*, 60, and find that the point raised by this exception, was not presented in that case for the consideration and judgment of the Court of Appeals.

It was an action of *assumpsit*, brought by the appellees against the appellant, and *Chandler* and *Raison*, to recover the sum of $188.43, alleged to be due by them as partners.

The defendants confessed the promises alleged in the declaration, subject to the opinion of the court, on the following statement of facts:

"It is agreed that the co-partnership existed between *Peregrine Ward*, *Philip F. Raison*, and *Francis B. Chandler*, from a period prior to the signing of the paper, hereafter mentioned, till the fall of 1814, at which time the said co-partnership was dissolved. That on the 17th of August 1815, after the dissolution of the co-partnership, and after the knowledge of such dissolution on the part of the plaintiffs, *Philip F. Raison*, one of the co-partners aforesaid, subscribed the paper hereto annexed, in the manner as thereby appears. It is submitted to the court, whether the signature of *Philip F. Raison*, made as aforesaid, is evidence to prove the existence of the debt against the said *Peregrine Ward*."

It appears that the single question raised by the case stated for the determination of the court, was, whether the admission

of one partner, made after the dissolution of the partnership, was evidence to prove the existence of the debt against the other partners.

Upon this point the court said:

"The evidence was not sufficient to charge the partnership with a debt, though it would be sufficient to take the debt out of the statute of limitations."

The observation of the court with respect to the statute of limitations, is, of course, a *dictum;* and the language used is so general, that we cannot assume that the learned court intended to intimate an opinion, that the admission of one partner would be sufficient to remove the bar, in a case where the statute had attached.

The question, then, is to be treated as an open one in *Maryland;* and we consider the safe and sound doctrine to be, both upon principle and analogy, that the acknowledgment of one partner, of a subsisting partnership debt, if made subsequent to the dissolution of the partnership, and after the statute of limitations has operated on the demand, is not evidence against his co-partners, so as to deprive them of the benefit of the statutory bar.

Upon this ground we reverse the judgment of the county court.

We desire to be understood as expressing no opinion, with reference to the sufficiency of the acknowledgments, relied on by the appellee to take the cause out of the statute of limitations; and the view we have taken of the defence, presented by that statute, renders it unnecessary to decide the various questions which were agitated in the argument of the cause.

JUDGMENT REVERSED, AND
NO PROCEDENDO AWARDED.

Dorsey, J., dissented.

The appellee afterwards, at the same term, moved for a writ of *procedendo*, to enable him to re-try the cause, and supply further evidence upon the subject of limitations. That motion is still depending.

## Abraham Barnes, Edmund Lynch, and Jacob Craft, *vs.* Francis Dodge.—*December* 1848.

Between 1832 and 1839, judgments were rendered against *B* and his sureties. In October 1839, the defendants, *B*, *T*, *P*, conveyed their property in trust, to sell and pay judgment and other creditors, according to their legal priorities. In 1840 and 1841, the trustees sold parcel of the estate to *D*, and the purchase money was applied by him in discharge of elder judgments, which were thereupon assigned to the purchaser: a full and fair value was paid for the land. In 1838, *L* and *C* obtained judgments against *B* and others, and, in 1844, revived the same, by *scire facias*, against *B* and his terre-tenants, of whom *D* was one. The judgment of *L* and *C* was *junior* to those paid off by *D*. The purchaser, when the *sci. fa.* issued, was a non-resident, and not returned summoned under that writ. The judgment being revived, *L* and *C* were proceeding to a sale of the land, under the lien of their judgment of 1838. It appearing that the amount of the judgments, prior to that of 1838, was more than the value of the whole estate, Held, that an injunction obtained by *D*, should be continued until final hearing, unless *L* and *C* would bring into court the sum paid by *D*, in discharge of the senior judgments.

The defendants, *L* and *C*, not having assented to nor participated in the formation of the trust created by *B*, and *P* and *T*, nor having ratified the same, are not bound by its terms.

The complainant, *D*, had no defence at law. He could not have successfully pleaded to the *scire facias*. He could not have maintained payment, satisfaction, or release of the judgment of *L* and *C* at law, or that *B* was not seized at the rendition of the judgment.

But in equity, as no combination, fraud, or unfairness appeared in the purchase of the land—as it was sold for its full, utmost, value—as the whole purchase money had been applied by the purchaser, to the payment of the judgments *prior* in date, and *preferred* liens on the land, and as there *then* remained due on judgments a large amount against *B*, prior in point of date to the judgment of *L* and *C*, and as the payment of the judgment of *L* and *C* out of this land was beyond the reach of hope, the purchaser is entitled to relief by injunction, as against such revived judgment and execution thereon.

The 3rd sec. of the act of 1835, ch. 380, shows, that a defendant who has answered a bill for an injunction, may appeal from the granting or refusal to dissolve it upon motion, without waiting for the answers of his co-defendants.

Appeal from the Equity Side of *Washington* county court.

The bill in this cause was filed on the 14th August 1846, by *Francis Dodge*, and alleged, that *Abraham Barnes* being indebted unto divers persons, and many judgments having been recovered against him in *Washington* county court, as principal

debtor, and *Melchor B. Mason* and *John Thompson Mason*, as his sureties; that the said *Abraham Barnes and wife*, and the said *Melchor B.* and *John T.*, by deed, dated 11th October 1839, conveyed to *David G. Yost*, (since deceased,) and *William Price*, certain lands in *Washington* county—parcels thereof belonging to the said *Abraham Barnes*—other parcels to *Melchor B. Mason*—other parcels to *John T. Mason*, in trust, among other things, to sell and dispose of said lands, and the proceeds thereof to apply to the creditors of the said *Abraham* and others, by judgment, or otherwise, *according to their just priority;* and, by said deed, the said *Barnes*, also assigned to said trustees a considerable personal estate, for the purpose aforesaid; that the trustees entered upon the execution of the trusts confided to them, and at several times have sold parcels of the said real estate to divers persons, and, *among others, to your orator;* that on the 26th May 1840, and 16th September 1841, he purchased of the said trustees, in two parcels, six hundred and nineteen acres, part of the *Montpelier* estate, for which he obtained a deed, on the 11th December 1844, *and which was a part of the individual estate of the said Abraham Barnes;* that the prices given by the complainant, are truly stated in their said deed; *that the said lands sold for their full and utmost value;* that his purchase money amounted in the aggregate to the sum of $37,885.93, which was fully settled on the 11th December 1844, when he obtained his deed from the trustees; *that the whole of the said purchase money hath been duly applied to the oldest of the said judgments against the said Abraham Barnes, binding said lands*, and advanced to the creditors holding and entitled to said judgments, according to their legal priorities and the trusts of said deed, *and hath been exhausted therein, leaving nothing for the junior judgments*, and that the said several sums *were applied and advanced as follows*, &c.; that assignments were taken to complainant from the said several judgment creditors, at the time he advanced and applied the said sums; *that the judgments to which his purchase money was applied, all bear date prior to the judgment of Lynch and Craft* against said *Barnes and others*, and which judgment last referred to, was

*not* obtained until the 5th April 1838, and that the aggregate amount of all the judgments obtained in said court against said *Barnes* and others, amounted to $92,892.33, for principal alone, and complainant had well hoped, by his payments, he had obtained an unquestionable title to his purchased lands; but that *Edmund Lynch* and *Jacob Craft*, trading under the firm of *L. & C.*, *having recovered judgment prior to the execution of the said deed of trust, but subsequent to those judgments to which your orator's purchase money had been applied*, have recently caused their said judgment to be revived against complainant and others, as *terre-tenants* of said *Barnes;* that it is only recently said proceedings have come to his knowledge; that said judgment was revived without his knowledge, consent, or approbation; that he resides out of the State of *Maryland*, in the *District of Columbia*, and was never summoned to said *scire facias;* that the entry of the *fiat* upon the writ of *scire facias*, was, by agreement and confession of attorneys of this court, who were the trustees of whom he purchased, and *who undertook, voluntarily, to appear for him;* that he never employed them, and they were in no wise authorised to appear for him, or make such confession or agreement; that the said *Lynch* and *Craft* have caused a writ of *fieri facias* to be issued on said *revived judgment*, and to be laid on the lands so as aforesaid purchased by your orator, and which the sheriff of *Washington* county has advertised for sale, with the purpose, on the part of the said *L.* and *C.*, of coercing payment from complainant of their junior judgment; that *L.* and *C.* had notice of the said deed of trust, after the making thereof, and *acquiesced therein*, and in the assumption by the said trustees of control over the said property; that they suspended all proceedings on their aforesaid judgments, and by other acts indicative of their intention, to look for payment of their claims to the proceeds of sales which should be made by the trustees, *gave credit to the said trustees*, and enabled them to make sales more advantageous to the creditors than could otherwise have been effected, and that and for some time after the said deed, the said *William Price* was the attorney of record of said *Lynch* and *Craft;* that the trustees have

sold certain portions of said estate of said *Barnes* to *John Hanson Thomas*, after the sale to complainant; that no part of said *Thomas'* purchase money hath been paid by him to said trustees, but is held by him under the expectation of applying the same to some judgments, in which he is interested, junior to the said judgment of *L.* and *C.;* that the trustees have still undisposed of land. Prayer, for a discovery, account of property on hand, receipts by trustees, and disbursements; that money in hand may be applied to outstanding judgments, according to their just priorities; that it may be declared that the said complainant's purchase money was justly applied to the incumbrances affecting the said land, according to their just priorities, that he may be quieted and protected, in his purchased possession and enjoyment, against all the creditors of *A. B.* and others; that the said *Lynch* and *Craft* may be restrained, by injunction, from enforcing their said execution against the lands of complainant, that, as junior judgment creditors, they may be compelled to go against the other lands of the said *A. B.* bound thereby; that the sheriff may be enjoined from making sale; that the revived judgment as against him may be set aside; that if necessary, he may be subrogated to the rights of creditors, to whom his purchase money has been advanced as aforesaid, and that he may have such other and further relief as, &c.; subpœna, &c.

With this bill was filed:

Copy of the writ of *scire facias*, issued 20th March 1844, by *Lynch* and *Craft*, to revive their judgment of March 1838, against *Abraham Barnes, Melchor B. Mason*, and *John O. Wharton*, to give notice to said defendants, and *also unto the terre-tenants* of all the lands, &c., whereof the said defendants, on the 5th April 1838, were seized, &c.

The sheriff returned this writ, "that *Francis Dodge*, terre-tenant of a part of tract situate, &c., called *M. P.*, which was bargained and sold unto *F. D.* by *W. P.* and *D. G. Y.*, contained in the following, &c., containing, &c., which parcel of land the said *F. D.* is terre-tenant, as aforesaid, *was of the lands and tenements* of the said *A. B.*, on the 5th April 1838, and that the said *F. D. hath not any thing in my bailiwick by*

*which I could give him notice, nor is the said F. D. found in the same.*"

Other terre-tenants were summoned; and others not found by the return of the said writ of *scire facias*.

Also copy of the deed of trust of 11th March 1839, from *A. B. and wife, M. B. M.*, and *J. T. M.*, to *William Price* and *David G. Yost*.

List of slaves so conveyed.

List of judgments commencing in 1832 to 1839, inclusive.

Also copy of indenture of 11th December 1841, from *William Price* and *David G. Yost*, trustees, to *Francis Dodge*, which, after describing the premises sold, &c., recited, "that whereas the purchase money for the portions of the above mentioned land hereby bargained and sold, hath been fully paid and applied by the said *F. D.*, at the prices above mentioned, for the sale of said land, with the consent and by the direction of the said parties, *W. P.* and *D. G. Y.*, in manner following, that is to say, $12,422 to, &c.; $5000, $3000, and $6000, to, &c.; $1310.31 to judgment creditors, binding on said land; and $11,000 to *W. P.* and *D. G. Y.*; which hath been applied:—1st, to commissions of said trustees, and 2nd, to judgment creditors, next in priority to those already recited."

Short copies of the judgments paid were also filed with said bill; with assignments thereof to said *Francis Dodge*, under seal.

Also copy of the return of the writ of *fieri facias*, sued out by *Lynch* and *Craft* against *Barnes* and his *terre-tenants*, levied upon the land of complainant.

On the 14th August 1846, the county court, (T. Buchanan, A. J.,) ordered injunction against *Lynch* and *Craft*, and the sheriff of *Washington* county, enjoining them from selling the lands purchased by the complainant, under the aforesaid execution upon bond, &c.

The defendants, *Lynch* and *Craft*, answered the bill, the substance of which answer will be found in the opinion of this court.

The defendant, *William Price*, also answered the bill, and showed the application of the payments received by him in

discharge of the senior judgments against the said *A. Barnes*, to the full amount of the purchase money received from complainant.

On motion, and on the 11th August 1847, the injunction was continued until final hearing. The defendants below appealed to this court.

The cause was argued before SPENCE, MARTIN and FRICK, J.

By J. T. MASON for the appellants, and
By T. G. PRATT and F. A. SCHLEY for the appellees.

SPENCE J., delivered the opinion of this court.

The bill in this case charges, that judgments amounting to more than one hundred thousand dollars, had been rendered in *Washington* county court, against *Abraham Barnes*, as principal and *M. B. Mason* and *J. T. Mason* as his sureties; that the said *A. Barnes* and wife, and the said *M. B. Mason* and *John T. Mason*, by their deed, dated the 11th of October 1839, conveyed to *David G. Yost* and *Wm. Price*, certain lands belonging to the said *A. Barnes*, and other parcels of land, belonging to the said *M. B. Mason* and *J. T. Mason*, in trust to sell the same, and the proceeds to apply to the creditors of the grantors—judgment creditors—and others, according to their just priorities. The bill further charges, that said trustees, *Yost* and *Price*, did sell to various persons, at different times, all the land conveyed to them by said deed, except about 250 acres, which remained unsold; and among others they sold to the complainant, on the 26th of May 1840, and the 16th of September 1841, 619 acres of land, which had belonged to *Abraham Barnes*, and which was conveyed to said trustees for the sum of $37,885.93, and this sum is charged in the bill to have been "the full utmost value of the said land."

The bill further charges, that the whole of the purchase money was applied, by the complainant, to the payment of the oldest judgments against said *A. Barnes*, and which were binding on said land, according to their legal priorities, and according to the provisions of said deed of trust.

The bill sets forth the particular judgments to which the complainant's purchase money was applied, and alleges, that said judgments were, at the period they were paid by him, assigned to him. The complainant charges, that he paid the whole amount of the purchase money in the discharge of the oldest judgments against *A. Barnes*, and that having so discharged his obligation, for the purchase money, the trustees, *Yost* and *Price*, did on the 11th of December 1844, execute a deed to the complainant for said land.

The bill also charges, that the judgment of *Lynch* and *Craft* was obtained on the 5th of April 1838, and that the aggregate amount of all the judgments obtained in said court, against said *Barnes* and others, binding on said lands, and prior in date to said judgment of *Lynch* and *Craft*, was the sum of ninety-two thousand, eight hundred and ninety-two dollars and thirty-three cents.

The bill avers, that the complainant resides in the *District of Columbia*, and that since his purchase, and since his application of the purchase money, as above charged, the said *Lynch* and *Craft* have revived their said judgments against the complainant and others, as terre-tenants of *A. Barnes*, without knowledge, consent, or authority of the complainant, and have caused a *fieri facias* to be issued on said judgment, and levied on the lands which had been purchased and paid for by him, as aforesaid. The bill avers, that the said *Lynch* and *Craft* absolved the complainant from the obligation of seeing that his purchase money was duly and properly applied; for it charges that *Lynch* and *Craft* had notice of the deed of trust after the same had been executed, and acquiesced therein.

The bill also charges, that a portion of the land conveyed by said deed, was sold by the trustees to one *John H. Thomas*, who has not paid the purchase money, but claims to apply the same to the payment of a judgment against the grantors, *Barnes* and *M. B. Mason* and *J. T. Mason*, held by said *John H. Thomas*, subsequent in date to the judgment of *Lynch* and *Craft*.

The bill prays for an injunction against *Lynch* and *Craft*, and subpœnas against them and the other defendants.

The defendants, *Lynch* and *Craft*, filed their answer to the bill, and made a motion for the dissolution of the injunction, pending this motion, and before hearing, *Price*, another of the defendants, filed his answer.

The answer submits, that if all the allegations of the complainant's bill were true, that he had no redress in equity but that his remedy was at law; against his attorneys, if they had neglected their duty, or exceeded their authority.

The only allegation in the bill which the answer denies, is, that they ever assented to, acquiesced in, or recognised said deed of trust, never having known or seen the same, or been informed of its contents, nor ever acquiesced in the said trustees assumption of the contract over said property. This denial of all participation in the transactions between *Barnes* and the *Masons*, with *Yost* and *Price*, in relation to the trust, and the proceedings under the same, does, in the absence of proof to contradict this averment of the answer, discharge the defendants from all the legal effect of that proceeding upon their legal rights, as judgment creditors.

The answer insists, that the defendant had adequate and complete defence at law; this defence we have endeavored to discover. What defence could *Dodge* have made at law? What plea could he have successfully pleaded to the *sci. fa.*? He could not have maintained, either the plea of payment and satisfaction of the judgment, or release; or that the said *Abraham Barnes*, or any other person or persons, to the use of the said *A. Barnes* and his heirs, at the time of the rendition of the judgment in the writ of *scire facias* mentioned, were not seized of the lands and tenements, or any parcel thereof, in their demesne as of fee; and unless he could have proved, that the judgment of *Lynch* and *Craft* was obtained subsequent to the date of the deed of trust to *Yost* and *Price*, or that it had been paid and satisfied, or that the judgment had been released or surrendered, he could not, at law, successfully have resisted the fiat on the *scire facias*.

The answer alleges no charge of combination, fraud, or unfairness, in the purchase of the land by *Dodge* from *Yost* and *Price*. It does not deny that *Dodge* purchased the land

at its "full utmost value;" that he had applied the purchase money to the payment and satisfaction of the judgments, which were prior in date and preferred liens on the land; that he had thus paid and applied the whole amount of the purchase money, which he contracted to give for the land; and that there then remained due on judgments a large amount against *Barnes* and the *Masons*, prior, in point of date, to the judgment of *Lynch* and *Craft*. These allegations in the bill, not denied by the answer, clearly entitle the complainant to the interposition of a court of equity. The judgments paid by *Dodge* being prior in date, and so large in amount, placed the satisfaction of the judgment of *Lynch* and *Craft*, from this land, beyond the reach of hope.

If we are to take the allegation of the bill as true, (and the answer does not deny it,) that the aggregate amount of all the judgments obtained in said court against said *Barnes*, and binding said lands, and prior in date to the judgment of *Lynch* and *Craft*, was the sum of ninety-two thousand, eight hundred and ninety-two dollars, and thirty-three cents, there then still remain—after the payments made by *Dodge*, of $37,885.39, on the oldest judgments against this land, and which the answer does not deny to be the full value of the land—judgments, which are a lien on the land, greater in amount than *Dodge* has paid, and prior, in date, to the judgment of *Lynch* and *Craft*.

If, therefore, *Dodge* be coerced by force of the *fieri facias* of *Lynch and Craft*, to protect himself, and to secure the money which he has thus paid, he will be obliged to have writs of *fieri facias* issued on all the judgments which he has paid and satisfied, as aforesaid, and the land sold, at his own cost; for it is not denied by the answer, that he has paid the full value for it. This would be against equity and conscience.

*Judge Story*, in his work on equity, states it as a general principle in regard to injunctions after a judgment at law, that any facts which prove it to be against conscience to execute such judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed

himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorise a court of equity to interfere, by injunction, to restrain the adverse party from availing himself of such judgment. *Story's Equity, sec.* 887. And again, in sec. 894, he says: "Relief will be granted, where the defence could not at the time, or under the circumstances, be made available at law, without any laches of the party."

*Chief Justice Marshall,* in the case of the *Marine Insurance Company vs. Hodgson*, reported in 7 *Cranch*, 332, recognises the same principle, when he says: "It may safely be said, that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or, of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

Our conclusion, therefore, from the record in this case, is, that *Dodge* purchased the land, *bona fide;* that he paid full value for it; that he applied the purchase money to the payment of the judgments which were prior in date, and preferred liens; that these judgments have precedence of the judgment of *Lynch and Craft;* that he had no defence, at law, to the *scire facias* on *Lynch* and *Craft's* judgment; but that, in equity and conscience, he, under the circumstances of this case, ought to be reimbursed or satisfied the amount of money which he had paid and advanced on judgment, which, in law, took precedence to the judgment of *Lynch* and *Craft*, before they are allowed to sell said land under the *fieri facias* on their judgment.

The injunction should, therefore, be continued until final hearing; unless *Lynch* and *Craft* bring into court, or pay to *Dodge*, the amount of money, so as aforesaid paid by *Dodge* on said judgments.

The 3rd section of the act of 1835, ch. 380, is a conclusive answer to the objection, that the appellants have no right of appeal before all the defendants had answered.

The order of court is affirmed with costs, and the case remanded, that such further proceedings may be had therein as the nature of the case may require.

ORDER AFFIRMED, AND CAUSE REMANDED.

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THOMAS HUTCHINS *vs.* THOMAS HOPE.—*December* 1848.

*H, senior*, devised to his widow one-third of his personal estate, after the payment of debts and three legacies, amounting to $1800. *H, junior*, the executor, gave bond for the payment of debts and legacies. For the purpose of distribution two persons were chosen, by whom the entire personal estate of the deceased was appraised at $3306; and the executor paid his mother, in 1815, one-third, valued at $1102. In 1822, *H, junior*, paid his notes to his mother, for rent then due by him. These she assigned to the appellant. In 1836, the appellee filed his bill against the appellant, alleging, that the widow was overpaid by the executor, by inadvertence and mistake, $600 on her claim under the will; that the appellee also boarded and furnished her and her negroes. HELD: it was not to be presumed, that the widow claimed under the will of *H, senior*, but that she claimed and received, with the privity of the executor, what she might rightfully have claimed after rejecting the will, one-third of the personal property after payment of debts, and that both understood her true position.

After a lapse of twenty years, it is too late to open a settlement of accounts upon the ground of inadvertency, when both parties knew their rights.

A claim on which an action at law might have been sustained, cannot be used as a set-off in equity against an assignee of another legal claim.

Injunction causes upon motions to dissolve, are usually heard on bill and answer. Allegations in the answer, not responsive to the bill, without proof, do not affect the injunction.

At final hearing the defendant need not prove his allegations, in avoidance, in the first instance. The complainant must then establish his case. All his allegations then not proved are taken against him.

APPEAL from the Court of Chancery.

This cause was before this court in 1841, (see 12 *G. & J.*, 244.) The appeal was then taken from the refusal of the chancellor, (BLAND,) upon bill and answer to dissolve the injunction, which the present appellee, *Thomas Hope*, had obtained upon his bill. After the affirmance of the chancellor's order upon that appeal, the cause was remanded, proof

taken, and the injunction made perpetual upon the final hearing by (BLAND) chancellor. The subsequent proceedings in equity are sufficiently stated in the opinion of this court upon the present appeal.

The appeal was taken by the defendant below, and the cause argued before SPENCE, MARTIN and FRICK.

By H. W. ARCHER for the appellant, and
By C. McLEAN for the appellee.

FRICK J., delivered the opinion of this court.

The bill and answer in this cause, will be found in 12 *G. & J.*, 244; where the chancellor's order, refusing to dissolve the injunction, upon the answer of the appellant, was affirmed; and the cases having been remanded, the injunction, on final hearing by the chancellor, was ruled perpetual; and this decision, by appeal, comes now under review of this court.

The material allegations in the bill, are:—1. That *Mrs. Hope*, under whom the appellant claims as assignee, by inadvertence and mistake of the appellee, the executor was overpaid $600 of her claim, under the will. And 2. That the appellee boarded and furnished her, and her negroes and stock; for which he claims to be allowed, against certain bills obligatory, executed to her in her lifetime, and by her assigned to the appellant.

Supposing her to have acquiesced in, and taken under the will of *Thomas Hope, Sen.*, this alleged overpayment is then manifest. The terms of the will assigned to her one-third of the personal estate, *after the* payment of debts *and three legacies, amounting to* $1800. The executor gave bond for the payment of debts and legacies; and for the purpose of distribution, two persons were chosen, by whom the entire personal estate of the deceased was appraised; amounting, by the appraisement, to $3306; out of which the appellee passed over to *Mrs. Hope*, specific property of the estate, to the exact value of $1102.

But can such a presumption of acquiescence be predicated upon this state of facts, so directly opposed to it, in which she

must have believed that she received, and the executor supposed he had paid her, but one-third of the residue of the estate—*after allowing for the debts and legacies.* She was entitled to a full third of the personal estate, to the exclusion of these legacies; and that she could have rejected the will and claimed to this extent, is conceded. If, as an ignorant woman, she was uninformed of her rights, shall we presume against the executor, her son, that she was left in ignorance by him of this, her right of election? Is not the reverse a more probable and favorable interpretation *in his behalf*, that she was made to understand her true position, and that she required, and received, all that the law allotted to her, and no more? In the adjustment of this fund of $3300, more than one-half of it to be applied to specific legacies, it is difficult to conceive so gross an error to have been committed, and to remain undetected so long. The transfer and delivery to her, took place soon after her husband's death in 1815, and she appears to have held or disposed of the property as her own, up to the period of her death in 1833. As the specific legacies were paid off, this mistake, if such it was, must have been evident, that left but $1500 of the personalty, of which, by the terms of the will, the widow was to receive one-third, and the appellee, as residuary legatee, two-thirds, "after payment of debts and legacies." And yet she received of this sum, $1100; leaving to the appellee, $400; less the debts of the estate, if any existed.

In the absence of any evidence to weaken it, the rational inference then is, that she claimed and received what the law allowed her, with the privity of the appellant; who passed it over to her, and could not have failed to see at the time, how the arrangement affected him as regards the small balance remaining of the personalty. If a mistake, in the nature of things, it must have been made apparent then, or soon after; and if now only brought to light, after this lapse of years, some causes or circumstances ought to be adduced to explain it, other than what are relied upon and deduced from the will itself and its provisions. It is part of the case, also, that this will restricted her to a *smaller portion of the realty* than the law would award her; and upon the presumption that her son,

the executor, dealt fairly with her, she was by him apprized of her rights in this particular; and he properly surrendered, and she received, her full third of the personal estate.

If *Mrs. Hope* had received any thing beyond what was her just and rightful portion of the estate, it would afford some ground for the relief asked by the appellee. But when all that was done, is so entirely consistent with her rights, and is so easily reconciled and accounted for by the presumption, that she claimed and the executor acquiesced; it is now too late to open and repudiate this settlement, by recalling the will, and giving to its provisions their literal import and construction, to establish the allegation of inadvertence and mistake on the part of the appellee.

But we are not left to inference alone in the matter. We have before us the actual terms of the settlement between the widow and the executor, by which the whole third of the personalty is conceded to her as she received it.

The agreement to this effect, found in the record, runs thus:

"A list of articles taken by *Mrs. Hannah Hope*, being one-third part of the property appraised by *Wm. Nelson* and *A. Alderson*, by agreement between the said *H. H.* and *Thomas Hope*, executor of *Thomas Hope* deceased, and in part of *her third of the whole personal estate* of the deceased." And after enumerating them to the value of $1102, proceeds: "The above statement is made agreeably to an agreement made between *Hannah Hope* and me, for the division of the personal property of *Thomas Hope*, late of Harford county, deceased." Signed and sealed, "*Thos. Hope.*"

It is impossible to conjecture, after this, upon what the alleged mistake is to rest, unless upon the naked contrast or comparison of this agreement with the provisions of the will, which assigns to her only one-third after payment of the legacies. Yet this agreement has been acquiesced in through a long series of years, without the slightest evidence that it was to be impugned or disputed by the appellee. With the will before him, and the duty incumbent upon him to execute it, he must have been fully aware of his rights, and the limited

pretensions of *Mrs. Hope*, if it was intended by the parties to sustain the will.

In 1822, the notes (which are here enjoined,) were given by him to *Mrs. Hope*. They were given in settlement between them, for rent due by him at the time. This alleged mistake was said to be made several years before this settlement; and yet, if any such ground of sett-off or claim then existed, it was not brought into view. If it really existed, and as is maintained, was reserved, under the peculiar circumstances of the parties, until the maturity of the notes, and after the death of *Mrs. Hope*, it is, at all events, too late to assert it against her assignee, whose right and claim, as a *bona fide* holder of them, is unimpeached; and the consideration by which he holds them, being legally sufficient to protect him. Looking, then, to the terms and provisions of this will,—which are so simple, that it is almost impossible the appellee could have mistaken his rights under it; regarding, further, the emphatic terms of the agreement, by which the will is disregarded, and one-third of the whole personal estate conceded to her, and the long acquiescence of the appellee, (no matter under what circumstances,) in the settlement thus made,—we must conclude, that as *Mrs. Hope* received no more than what she might legally and rightfully have claimed, there is no such mistake or inadvertence on the part of the appellee, as will entitle him to the relief he seeks in equity.

On the claim set up in the second place, for board furnished to *Mrs. Hope*, and her negroes, and stock, it is sufficient to say that if such indebtedness existed, it was a legal defence to the suits at law;—that it appears from the record, it was pleaded in bar at the trial, and was passed upon by the court and jury; and is now no further subject of enquiry or revision by this court.

When this case was formerly before this court upon the bill and answer, the injunction was continued unto the final hearing, inasmuch as the answer was not responsive to the allegations of the bill, but set up other, and distinct matters in avoidance of the complainants equity. Nothing short of the proof of such a defence, at that stage of the cause, could be

allowed to affect the injunction. But upon the final hearing, it is not for the respondent to sustain this new or evasive matter set up in defence;—at all events, not until the complainant has established the allegations of his bill. At a final hearing, every allegation is taken against the complainant that is not proved by him. It is shewn, in this case, that the complainant has not satisfactorily established the alleged inadvertence and mistake, and the matter offered in avoidance is thus necessarily out of the case. But even if it could be deemed material (which we think it is not,) in the present aspect of the case, in our opinion the agreement before recited, between the appellee and *Mrs. Hope*, sustains the defence set up, and is, in any view, conclusive of the case.

The injunction is therefore dissolved.

DECREE REVERSED.

ISAAC TYSON *vs.* THOMAS B. WATTS.—*December* 1848.

An agreement set forth, "that *B* had on his farm, copper and other minerals, and is desirous to have the same properly explored and worked"—that "*P* is willing to undertake such exploration and working." *W*, "in consideration of one dollar paid to him by *P*, agrees to give *P* the power to make such exploration and works, as *P* may think proper for such purposes, and reduction and conversion of the minerals, and dispose of the same;" that *W* reserves to himself *one-fifteenth* part of all such minerals and metals, after the same shall have been rendered fit for smelting, free and clear of all expenses; that *P* shall commence on or before, &c. HELD, upon a bill filed by the assignee of *P*, for specific execution of the contract, that *P* was only bound to *explore* the mines, not to *work* them, and that he only stipulated to explore them on or before a given day, and therefore specific execution, for want of mutuality in the contract, could not be decreed.

APPEAL from the Court of Chancery.

The bill in this case was filed on the 21th June 1846, by the appellant against the appellee.

The bill alleged, that on the 8th July 1844, *Thomas B. Watts* entered into a written agreement with *Thomas Pethcrick*, of the State of *Pennsylvania*, which, after reciting that *Watts* had on his farm at *Bare Hills*, in *Baltimore* county,

*Maryland*, copper and other minerals, which he was desirous to have *explored and worked*, and that *Thomas Petherick* was willing to undertake such exploration and working, declared, that *T. B. W.*, for, &c., in consideration of one dollar paid to him by *T. P.*, agreed to give to *T. P.*, his heirs and assigns, full power to make such explorations and works on the said farm as he, *T. P.*, might think proper for such purposes, and for the reduction and conversion of the minerals, and to carry away and dispose of the minerals or metals, subject to the following conditions, viz:

"That there should be reserved to *Watts*, his heirs or assigns, a seignorage of one full fifteenth part or share of all such minerals or metals, after the same should have been rendered fit for smelting, reduction or use, free and clear from all expenses whatsoever." "That *T. P.*, his heirs or assigns, should, on or before the 10th July 1845, commence proper explorations, for the purpose of ascertaining the mineral prospects on the said farm. That if the seignorage should be found to be less than the average rate of seignorage, or dues paid to the land owners on the ores raised in the great copper mining district of *Cornwall*, in *England*, such seignorage should be increased to such average rates, to be determined by the arbitration of two respectable and competent persons, (one to be chosen by each party,) after they should have made satisfactory enquiries on the subject. That on the 18th June 1845, *T. B. W.* agreed with *T. P.*, by agreement in writing of that date, to make the proper explorations, for the purpose of ascertaining the mineral prospects on said farm, as provided in the agreement first aforesaid, and within the time therein limited for commencing such explorations, for which *T. P.* was to pay to *Watts* thirty dollars; fifteen of which were paid at the time. That the explorations were made according to a plan furnished by *T. P.*, and were completed by said *Watts* about the 24th July 1845, when he was paid fifteen dollars, which, with ten dollars paid to him on the 16th July, made forty dollars, which he received for his work, besides four dollars and seventy-one cents, paid to him for, &c., connected with said work; that at the time of making the foregoing agreement, *T. P.* believed

that *Watts* was the owner in fee of the property mentioned therein, and called his farm at *Bare Hills;* and believed also that the property was unincumbered, and that *Watts* had good right to enter into the agreement first aforesaid, and authority to carry out the same; but, in point of fact, as *P.* afterwards discovered, *Watts* was entitled, when he made said agreement, to the *reversion only* of the said property, after the life estate of his mother, *Lydia Watts*, then living thereon, and that his reversionary interest, even, was incumbered by a mortgage, which, &c., to secure, &c. That *T. P.*, although disappointed in his expectations about the said mining privileges, in consequence of his misunderstanding of *Watts'* title, was nevertheless willing to take from *Watts* such title as he was able to give, even though the enjoyment of the privileges agreed to be conveyed to him, would be thereby postponed until after the decease of the tenant for life. That on the 22nd December 1845, *T. P.* assigned in writing all his interest in the mining privileges, acquired under the contract aforesaid, to complainant; that complainant purchased from *T. P.*, in good faith, looking forward to the enjoyment of the said privileges after the decease of the tenant for life, and that he accordingly demanded from *Watts* a conveyance of the said mining privileges, agreed to be by him, *Watts*, conveyed to *T. P.*, according to the extent of his, *Watts'*, interest therein; but *Watts* has hitherto refused to make the said conveyance, and affects to treat as a nullity his agreement with *T. P.* Prayer, for specific performance, and for general relief.

The complainant filed, with his bill, the several contracts and agreements therein referred to, and which, with the answer, are sufficiently stated in the arguments of counsel and opinions of the chancellor, and of this court, *post.*

At March term 1847, the chancellor, (Johnson,) delivered the following opinion:

The bill is for the specific performance of an agreement between the defendant, *Thomas B. Watts*, and *Thomas Petherick*, bearing date the 8th July 1844. It recites, that "*Watts* has on his farm at *Bare Hills*, in *Baltimore* county,

in *Maryland*, copper and other minerals, which he desires to have properly explored and worked; and that *Petherick*, residing at *Philadelphia*, in *Pennsylvania*, is willing to undertake such exploration and working; and then, in consideration of one dollar paid to him, *Watts*, by *Petherick*, he, *Watts*, his heirs and assigns, agreed to give *Petherick*, his heirs and assigns, full power to make such explorations and works on the said farm, as he, *Petherick*, may think proper for such purposes, and for the reduction or conversion of the minerals, and to carry away and dispose of the minerals or metals, subject to the following conditions, viz:

"That the said *Watts* reserves to himself, his heirs or assigns, a seignorage of one full fifteenth part or share of all such minerals or metals, after the same shall have been rendered fit for smelting, reduction or use, free and clear of all expenses whatever. That said *Petherick*, his heirs or assigns, shall, on or before the 10th July next, commence proper explorations, for the purpose of ascertaining the mineral prospects on the said farm; that if the seignorage above reserved, be found to be less than the average rate of seignorage, or dues paid to the land owners on the ores raised in the great copper mining district of *Cornwall*, in *England*, such seignorage, above reserved, shall be increased to such average rate, to be determined by arbitration," &c.

There is then a provision, that *Petherick* should give references as to his respectability, prior to this contract, as it appears by the date of the paper, to wit, on the 18th of the preceding month of June, the defendant had agreed, for the sum of $30, to make for *Petherick* an excavation to the shaft sunk on the copper ore on the farm, which sum, with some small additional sums, were shown to have been paid, and it appeared by a paper, under the hand and seal of *Petherick*, dated on the 22nd of December 1844, but acknowledged on the 22nd of December 1845, that he had disposed of his interest under the agreement with the defendant to the plaintiff. The transfer thus signed, sealed and acknowledged by *Petherick*, and which is written upon the same paper upon which the agreement is written, is in these words: "I hereby acknowledge to have

disposed to *Isaac Tyson, Jr.*, of *Baltimore*, my right and interest under the annexed agreement. *Pottsville, Pennsylvania*, December 22nd, 1844."

The bill, which seeks the specific execution of this agreement, the rights under which are thus supposed to have become vested in the complainant, alleges, that *Petherick*, at the time of making the agreement, believed that *Watts* was the owner of an unincumbered fee-simple-interest in the property mentioned therein, and had a perfect right to make and carry out the contract; but that he afterwards discovered that he was entitled only to the reversion, after life-estate of his mother, then and still living, and that his reversionary interest was incumbered by a mortgage for a considerable sum of money. That *Petherick*, nevertheless, notwithstanding his disappointment in regard to the title of *Watts*, was willing to take from him such title as he was able to give, though the enjoyment of the mining privilege would be thereby postponed until after the decease of the tenant for life. That the complainant purchased from *Petherick*, in good faith, looking forward to the same period for the enjoyment of said privilege, and that he accordingly demanded from *Watts* a conveyance of the privilege of mining, to the extent of his interest in the property, but that *Watts* refuses to make any conveyance whatever, affecting to treat the agreement as a nullity.

The defendant, in his answer, and in the agreement made by his counsel, rests the relief prayed by this bill upon several grounds:

1st. That all title to a decree for the specific performance of the agreement, has been forfeited by the laches of *Petherick*, in not commencing mining operations so soon, as by the contract he was required to do, no such operations having been begun at the present time.

2nd. That *Petherick* is now, and always had been, an unnaturalized foreigner, never having resided in *Maryland*, and for that reason, incompetent to receive, or transfer to the complainant a title to the lands, or the mining privilege aforesaid.

3rd. That prior to the alleged transfer to the complainant, *Petherick* had surrendered and abandoned to the defendant

whatever rights he acquired under the contract; and that the defendant, on his part, released *Petherick* from all claims and demands he might have had against him in respect thereof; and that this was known to the complainant at the time he took the said alleged transfer.

4th. That the contract, as now expounded by the complainant, is inequitable and unjust, destitute of mutuality and fairness, and as wanting in those qualities which should induce a court of chancery in the proper exercise of that discretion, which the rules and principles, applicable to such cases, give the court over the subject, to decree a specific performance.

An agreement was entered into by the parties, by which a number of letters were admitted in evidence, to have the same effect as if proved under a commission; and it was also admitted, in the same way, that *Petherick is not a citizen of the United States, and that he never resided in the State of Maryland.*

The chancellor does not consider it necessary to refer particularly to these letters, as, in his opinion, the case must turn upon grounds having no connexion with their contents, and upon which they can shed little or no light.

This, as has been remarked, is a bill for the specific performance of an agreement; and is therefore an application to the sound discretion of the court, which withholds or grants relief, according to the circumstances of each particular case, as it presents itself. The discretion, it is true, is not arbitrary and capricious, but sound and reasonable, adapting itself, and being governed, as far as practicable, by general rules and principles,—when those rules and principles are not in conflict with the justice of the case between the parties. There would seem to be no doubt, that when a court of chancery is called upon to exert its extraordinary jurisdiction, in compelling the specific performance of contracts, though it is not entirely exempt from those general principles of equity, which have been found, by experience, best and most surely to advance the aims and ends of justice, there is, nevertheless, more freedom in its action, than when exercising its ordinary powers. *St. John vs. Benedict*, 6 *John's Ch. R.*, 111. *Seymour vs. Dulancey*, *Ib.*, 223. *Geiger, et al., vs. Green*, 5 *Gill Rep.*, 472. "Unless the court is

satisfied, says *Chancellor Kent*, that the contract is fair and just, and equal in all its parts, and, founded on an adequate consideration, it will not, by the interposition of its extraordinary power, order it to be executed," and this seems to be the established doctrine upon the subject.

If an agreement is deficient in either fairness, justice, or certainty, its specific execution will not be decreed, and hence a stronger case is required on the part of a plaintiff asking a decree, for the specific performance of a contract, than is required of him who resists such decree. 2 *Story Eq.*, *sec.* 769, 770.

And, in addition to the elements of fairness, justice, and certainty, the agreement must be *mutual*, before the power of the court, to order its specific performance, can be successfully invoked, and, indeed, it may be well doubted, whether a contract can be considered, in any respect, fair and just, if it be not mutual. "I have no conception, (says *Lord Redesdale*, in 1 *Sch. & Lef.*, 18,) that a court of equity will decree a specific performance, except where both parties had, by the agreement, a right to compel a specific performance, according to the advantage which they might be supposed to have derived from it."

The Court of Appeals, in the case referred to, of *Geiger, et al., vs. Green*, 5 *Gill*, 472, say, "it is established, that unless there is to be found in the contract the essential ingredient of *mutuality*, a court of equity will not compel its specific execution," and in that case, the bill was dismissed, because of the absence of that indispensable ingredient.

The contract upon which the bill in this case is filed, and the specific performance of which it seeks to enforce, contemplated, not only the exploration, *but the working* of the mines of copper and other minerals, on the farm of the defendant. It recites the desire of the defendant to have them explored and worked, and the willingness of the said *Thomas Petherick* to undertake such explorations and working, and then, in consideration of one dollar paid to the defendant by *Petherick*, the former agreed to give to the latter, his heirs and assigns, full power to make such explorations and works on the said farm as he, the said *Petherick*, might think proper for such purpose,

&c.; and after a reservation to the defendant of a seignorage, of one full fifteenth part of the minerals, *Petherick*, for himself, his heirs and assigns, stipulated that he would, on or before the 10th *July* next, commence proper operations for ascertaining, by explorations, the mineral prospects on the said farm.

Although, therefore, it was the manifest design and object of the defendant to have the minerals upon his farm worked, as well as explored, and although, for a small pecuniary consideration, he gave *Petherick* full power to such explorations and works, the only stipulation on the part of *Petherick* is, by a certain period, "to commence operations, for ascertaining, by explorations, the mineral prospects on the said farm." The engagement, therefore, on the part of *Petherick* was limited to the exploration; and he was not bound, according to my interpretation of the contract, to work the mines; whilst, therefore, the contract gives to him the power to work the mines, as he might think proper, the only corresponding obligation on his part was to explore, for the purpose of ascertaining the mineral wealth of the farm. There can be no doubt, I think, that the defendant never would have entered into this contract, if he had believed that the working of the mines was not secured by it, and that whether they should be worked or not, depended upon the discretion of the party with whom he was contracting. The contract, therefore, it seems to me, is deficient in that reciprocity of obligation, without which a court of equity will not decree a specific performance. It appears to me difficult to maintain, that the defendant could have obtained a decree against *Petherick* for the specific execution of this contract to the extent, which he clearly had in view in entering into it; that is, to compel *Petherick* to work, as well as to explore, the minerals, even though the title of the defendant, to the farm, had been entirely unincumbered; and, if this is the case, that is, if there is a want of mutuality in the remedies, as well as the rights of the parties to the contract, it would be inequitable, as said by *Lord Redesdale*, in 1 *Sh. & Lef.*, 18, to decree a specific performance at the suit of him who is not bound, as, if the rule were different, he might en-

force, or avoid the contract, according as his interest might incline him, the one way or the other. It is much better in such cases of inequality of obligation, to refuse a specific performance, and leave the plaintiff to seek his compensation, if he has sustained damage, by an action at law; because, if equity acts at all, it must, as *Chancellor Kent* says, in 6 *J. C.*, 232, "act *ex vigore*, and carry the contract into execution with unmitigated severity."

The contract, in this case, though varying, of course, in terms, and, in some respects, perhaps in substance, from the contract in the case of *Geiger vs. Green*, decided by the Court of Appeals; yet, in other and in some very essential particulars, it very much resembles that case. In that case, the contract gave the complainant the privilege of digging and removing ore from the farm of the defendant, at twenty-five cents per ton for the privilege of the ground; leave also to build a house on said land, the workmanship to cost $100, the material to be got on the land of defendant, at the expense of the plaintiff.

This contract, the Court of Appeals say, is unequal in its stipulations, binding one party and not the other, and consequently unreasonable, and unfit to be carried into specific execution.

It seems to the chancellor, that so far as regards the chief inducement to the contract, on the part of the defendant in this case, to wit, the working and making the deposites of mineral profitable to him, it is precisely like the contract in *Geiger and Green*, because here, as in that case, the power to work the minerals is a privilege to *Petherick*, which he may or may not exercise, in his discretion; and, consequently, this contract, like that, is binding on one party, and not the other, and unfit, for that reason, to be executed.

This bill, however, was not filed by *Petherick*, but by his assignee; a party with whom the defendant made no contract at all, one who has entered into no stipulations with him, of any description, and who, although he has purchased the interest of *Petherick* in the agreement, has entered into no engagement to perform such stipulations, as the contract may be supposed to have imposed upon *Petherick*.

The chancellor thinks it would be difficult to maintain, successfully, that upon a bill filed by the defendant against this plaintiff, the latter could be compelled to perform those acts, which it was clearly the intention of the defendant to secure, when he made this contract; and, if so, the want of the element of mutuality, as between these parties, is supposed to be fatal to the right of the present plaintiff to a decree for a specific performance.

It being the opinion of the court, for the reasons stated, that the plaintiff is not entitled to relief, and that the bill must be dismissed, it is not thought necessary or proper to examine the other questions raised in the argument, and by the pleadings, and therefore no opinion is expressed upon them. It may, however, not be improper to say, that there does not, in the confusion and discrepancies, which have been pointed out and commented upon in the statement of the chancellor, appear to be any ground for attributing unfair or dishonorable motives to the plaintiff.

The explanation which has been given in regard to these discrepancies, seems to me entirely to relieve the complainant from any such imputation.

Whilst, however, the court abstains from expressing an opinion with regard to the effect upon this case, which the circumstance of *Petherick's* being an alien may be supposed to have, or upon the question of his alleged laches or abandonment of the contract, as evidenced by the correspondence, it is deemed not out of place to remark, that the uncertainty of the provisions of the instrument which is sought to be enforced, would present a serious objection, if the other difficulties were removed. If this contract is to be enforced as against the defendant, the plaintiff should surely be required to perform the agreement on his part; but what can he be required to do, and when no time is fixed for working the mines; that this is referred to his own discretion, and cannot be commenced until after the determination of the life estate of the mother of the defendant, she being still living. Upon the whole, the chancellor thinks, the want of the mutuality, the uncertainty, and the difficulty of enforcing this agreement consistingly with

those principles of equity, by which the court must be governed in the exertion of its powers, forbid the relief asked for by this bill, and that it must, consequently, be dismissed.

The complainant in chancery appealed to this court.

The cause was argued before SPENCE, MARTIN, and FRICK, J.

By J. H. B. LATROBE and REVERDY JOHNSON for the appellant.

On the 24th June 1846, the appellant filed a bill in *Baltimore* county court, sitting in equity—subsequently removed to chancery—for the specific performance of an agreement, between the appellee and one *Thomas Petherick*, under whom the appellant claims. The bill sets out the terms of the agreement.

There was no oral testimony taken under the commission issued in the cause, which is therefore to be determined upon the bill and answer, the two agreements, the receipts, the assignment to *Tyson*, and the correspondence.

The answer sets up as a defence, certain conversations between *Petherick* and himself, before the execution of the contract, but the conclusive reply to so much of the above as relates to *Petherick's* promises, antecedent to the agreement, is the agreement itself; to which, all that took place between the parties beforehand, was mere inducement; and beyond which we are not permitted to look, to ascertain their meaning.

The remaining grounds, on which the claim for a specific performance is resisted, are but two :

1ST. That *Petherick*, as an alien foreigner, "was not competent, at law, to receive a deed for the lands or for the mines;" or "to pass or transfer any right to the complainant."

2ND. That, even if this ground was not tenable, *Petherick*, before the transfer to the appellant, "actually surrendered, abandoned, and gave up, all his supposed rights acquired under the said agreement;" and the appellee "had released" him "from all claims and demands" under it. It is true, that fraud is charged upon the appellant, but this is not proved.

The first of these grounds involves a question of law, in regard to the extent of an alien's power, in the acquisition and transfer of land, or interests in land :—the second a question of fact, as to the surrender of the rights acquired under the agreement.

*First*, then, as to the effect of alienage.

There can be no force in this objection; because, "That an alien can take by deed, and can hold till office found, must now be regarded as a positive rule of law, so well established, that the reason of the rule is little more than a subject for the antiquary." *Governeur's Heirs vs. Robertson*, 11 *Wheaton*, 366. *Creigh vs. Radford*, 3d *Wheaton*, 599. *Orr vs. Hodgson*, 4 *Wheaton*, 460. *Bacon's Abr. Aliens C. Buchanan vs. Deshon*, 1 *H. & G.*, 289.

*Second*, as to the abandonment.

The evidence of this is presumed to be found in the correspondence; and in the fact, not denied, that the mine was not worked by *Petherick* or the appellant from the time that the exploration was completed, and the appellee paid for making it, up to the filing of the bill.

The correspondence consists of many letters. There are two filed by the appellant, and eleven by the appellee.

Bearing in mind, that we are examining them, with a view to see how far the charge of abandonment is sustained, we turn to a few of them; and pursuing the order of time, we go first to those filed by the appellee.

Appellee's exhibit 5, p. 17, 15th August 1841. *Petherick* writes to *Watts*, (appellee,) and, after some remarks about the accounts of the latter, for the cost of the exploration, says, that he "intends to associate others with him *(P.)* in the prosecution of the mine."—And further, "I will trouble you to see *Mr. David Stewart*, and shew him your title, *that he may prepare a deed in conformity with an (our) agreement, for the mine.*" And again, "I shall send regular miners to sink deeper the pit."

This letter is important, introduced, as it now is, by the appellee, because it shews a well understood purpose between the parties to consummate the agreement by a formal deed ;—

just such a deed as is now claimed at the hands of the appellee; a deed to be prepared by the counsel of *P.* The letter contains, also, at *W's* request, a table of the seignorages paid in *Cornwall;* shewing that the rent for the *future* working of the mine, was looked to by *W.* and *P.* both.

Appellee's exhibit 6, p. 18, 22nd August 1844, *Petherick* to *Watts.* In this letter *Petherick* agrees to give *Watts* $60 for the work of the exploration, or $20 in addition to the $40 already paid. He directs him to call on *Mr. Stewart* for the money, and says, "Don't forget to give *Mr. Stewart* the necessary papers *to make out the deed,* as I wish to have matters put in proper train for proceeding with the further trial."

Appellee's exhibit 7, p. 18th September 26th, 1844, *Petherick* to *Watts. Petherick* says in this letter: "The matter now rests, not from any neglect of mine, but to have the deed completed, which I expected could have been done before this, and I shall write to *Mr. Stewart* by this post urging him to expedite it. Notwithstanding my wish and intention to proceed with the works, still, as the matter now stands, if you are desirous to engage with the parties whom you mentioned, as being waiting to embark in the undertaking immediately, I shall not object to admit them, and to retire; provided they will *immediately* reimburse me my actual outlay, including my traveling expenses, and *Mr. Stewart's* bill; but not charging anything for my time and attention to the business. If you wish to avail yourself of this, please to inform me promptly, for my government in the matter, otherwise I shall, on having the deeds, associate friends with me in the business; which I believe will prove a remunerative one. Requesting an early communication from you," &c.

Up to this time there was no abandonment, clearly; for we find *P.* offering to sell out to *W.* on terms, which *W.* never accepted.

Appellee's exhibit, No. 8, 23rd January, 1845, *P.* to *W.* In this letter *P.* again puts the delay on the failure to have the deed prepared; speaks of an arrangement he had made with a *Cornish* miner, to take an interest at *Bare Hills*, in the

beginning of December; says he has done all that could be expected of him under the circumstances, and adds: "If however, you think this delay important, and have desirable parties to go into the business, I shall have no objection thereto, on the terms mentioned in my letter of the 26th September last, if you prefer it, *and will give me reasonable notice for my government.*"

Appellee's exhibit 24th February 1845.—*P.* to *W.*. This letter is in answer to one from *W.*, dated 20th February 1844, in which *W.* says, "I find you continue in the same mind to come on to work my copper mine." And then solicits a loan of money to pay off a debt due on the place. *P.* replies, "that it will not be convenient for him, at present, to make any advance beyond what will be required in connection with the party," referred to the letter of the 23d January, who has not yet returned to the country. In a postscript, *P.* again says, "if it will be of any assistance to you, in raising the money, I shall be disposed to transfer my interest in the property, on the terms mentioned in the letter of the 26th September."

The next letter in the record is, filed by appellant, from *W.* to *P.*, 9th May 1844, in which *W.* asks whether *P.* "intends to come on and work the mine or not, and at what time. If you have declined," he says, "please inform me by return mail."

At this time there had been no abandonment, clearly, in the estimation of *W.*, nor does he produce any letter from *P.* announcing the fact that he had abandoned the agreement.

The next letter of *P's*, filed by the appellee, is the letter of 6th October 1845, in which, after accounting for his delay in replying, *P.* says: "I have been in communication with a gentleman residing at *Baltimore*, who is disposed to enter into the concern in your property at *Bare Hills*, *under my agreement with you*, which I think better for all parties, than for me to wait for the assistance of the person in *Connecticut*;" referred to in the letter, &c.

We have thus gone through the correspondence, with reference to the allegation of the answer, that *P.* had abandoned

the agreement, and that *W.* had released him from its obligations ;—and instead of the allegation being sustained, we find it utterly contradicted. At the date of *Watts'* last letter of May 1845, we find him recognizing the existence of the agreement; and there is no pretence, that after the letter of October 6th, in which *Petherick* speaks of a gentleman in *Baltimore* disposed to enter into the concern, *under the agreement*—a letter which is produced by *Watts* himself, and which shows that *Petherick* still held on to the agreement,—there is no pretence, that, after this letter, *Watts* ever denied the right of *Petherick*, until long after the latter had transferred his rights to the appellee, the gentleman in *Baltimore*, referred to.

We may safely say, then, that so far as the defence rests on the *fact* of abandonment, it must fall to the ground. There certainly was no actual abandonment, such as is alleged in the answer, and no "release" of the "claims and demands" which *Watts*, in the answer, says that he released; and the admission of the existence of which, is an admission on his part, of the mutuality of the contract.

But it may be said, that the time which elapsed between the completion of the explorations and the filing of the bill, without anything being done in the way of working the mine, affords ground on which an abandonment may be inferred.

In the first place, the inference cannot prevail against the acts of the parties; and the correspondence shows, that, up to May 1845, *Watts* did not consider the contract abandoned; and that in October 1845, when *Petherick* spoke of selling to a gentleman in *Baltimore*, he, *P.*, believed it to be in full force.

But the rule, with regard to time, as of the essence of contracts, is a very plain one. It is stated briefly, in *Pratt, et al., vs. Law, et al.*, 9 *Cranch*, 456, 494, that time is made material to the specific performance of a contract, whenever, from the change of circumstances, a specific performance, such as would answer the ends of justice between the parties, has become impossible. *Brashear vs. Gratz, et al.*, 6 *Wheaton*, 528. *Garnett vs. Macon*, 2 *Brockenbrough*, 245.

Even this, however, is in cases where time is limited by the terms of the agreement. But in this case there is no time limited, by the agreement, for the commencement of the *working*, as we have seen. The time to begin exploration is fixed, and that is all.

But what are the facts, as charged in the bill, and admitted by the answer, and which address themselves to a court of equity? Why, that at the time the agreement was made, and at the time the bill for specific performance was filed, *Watts had no interest which could be prejudiced* by the failure, on the part of *P.*, to work the mine forthwith. *Watts* was the owner of the farm, *in reversion after the death of his mother, the tennant for life*, who was then living. The agreement which he made with *P.*, bound him, *W.*, only. It had no effect upon *her* interests. True, *Watts* says in his answer, that he had an understanding with her; but this is not responsive to the bill, and there is no proof of it; and, at all events, *P.* was without notice of it, so that, so far as *P.* was concerned, *W.* was agreeing to give to him a present interest in that which did not belong to him, an estate in the fee, while he was entitled to the reversion only.

It certainly does not rest with *W.*, then, to complain of the failure of *P.* to work the mine, during the mother's lifetime. As we have seen by the correspondence, *P.* again and again asked for a deed, in conformity with the agreement, and as a preliminary to going to work; a reasonable demand, which *W.* admits, in point of fact, by his answer, his obligation to grant, but for the alienage of *P.*, and the alleged abandonment of the agreement:—these being the only grounds on which he resists the claim for specific performance.

If, then, he had no other title to convey to *P.* but a reversionary one, how can he, in a court of equity, complain of *P's* not working the mine during the life of the tenant for life, from whom he had no authority to work it; and when the failure to work it caused no injury to *W.*

All the cases where specific performance is resisted, on the ground of abandonment of the agreement, rest on the injury which is done to the party, against whom the bill is filed, by

the neglect of the complainant. But, in this case, the party resisting was in no condition to be injured.

It may not be necessary, but reference is made to 2 *Sugden*, 28, for the law, and the cases illustrating it, in regard to the right of a purchaser to insist on such title as the vendor may be able to give, although less than that stipulated for; and although no injury would be sustained by the purchaser in case the agreement were not executed. The law on this point was not denied in the argument below: see, also, 2 *Story Eq.*, *sec.* 779, &c., on the same point, and cases there cited.

The fact, that the bill is filed by the assignee of *P.*, with whom *W.* has made no agreement, is suggested by the chancellor in his decision; but it is not argued or dwelt upon. But the agreement is one which expressly includes the assigns of *P.;* and whatever weight the suggestion, under other circumstances, might be entitled to, it certainly cannot prevail against the assignee, who, by seeking to enforce performance of the agreement, recognizes the obligations of *P.* as binding on him, and admits that their existence is a necessary preliminary to the enforcement of the rights which he claims, as against the appellee. Specific performance will be decreed at the instance of a party entitled to the benefit of an agreement, though not a party to it. *Hook vs. Kinnear*, 3 *Swanston*, 418. Where a contract is signed by one party only, the other, by filing a bill for specific performance, makes it binding on himself. *Martin vs. Mitchell*, 2 *Jac. and Wal.*, 427.

At the argument before the chancellor, the counsel for the appellee cited and relied upon, in addition to the defences of the answer, the case of *Geiger and Green*, then recently decided in this court; and the chancellor waiving, in his decision, the points of alienage and actual abandonment, decided that the present case was governed by the case of *Geiger and Green*, and dismissed the bill, because of the uncertainty and want of mutuality in the agreement. It becomes necessary, therefore, to look at the case in the light in which it has been considered by the chancellor, and test it by the law, as laid down by this court in *Geiger vs. Green*.

The principle settled in *Geiger vs. Green*, is, that "unless

there is to be found in the contract the essential ingredient of mutuality, a court of equity will not compel its specific execution,"—and the contract, in that case, not containing this ingredient, the bill was dismissed.

Now, is the contract between *P.* and *W.*, the same in this respect, with the contract in *Geiger vs. Green*?—Because if it is, there is an end of our case. Upon establishing a difference, upon shewing that our contract has the mutuality which the other wants, must our success depend.

The contract in *Geiger vs. Green*, is in the following words: "I hereby grant to *Richard Green* the privilege of digging and mining the ore on that part of my place joining *Welderson* and *Price's*, at twenty-five cents per ton, for the privilege of ground, leave also to build a house on said land, the workmanship to cost one hundred dollars: the materials to be got on my land at said *Green's* expense."

This was clearly nothing but a license, revocable at the pleasure of the grantor. It was a privilege to dig ore at a given rate per ton. There was no obligation on the part of *Green* to begin to dig; or, having begun, to continue. If he dug, he became liable to pay the rate agreed on, and this was the extent of his liability; and so this court decided. No time was fixed, during which the privilege should continue; and while digging, therefore, he was clearly a tenant at will.

The contract between *Petherick* and *Watts*, is a very different one. Its recital declares the desire of *Watts* to have his mines *explored* and worked, and the willingness of *P.* to undertake to *explore* and work them;—not merely to explore, observe, but to explore *and work;*—wherefore, that is, in consequence of *P's* willingness to explore *and work*, *W.* agrees to give "to *P.*, his heirs and assigns, full power to make such exploration *and works* on the said farm, as *P.* may think necessary for *such purposes*." For what purposes? Why, for the purposes which *Watts* was desirous to effect, and which *Petherick* was willing to undertake, to wit, the purposes of *exploring and working*. Can it be questioned, then, for a moment, on a careful reading of this contract, that the consideration for it was *P's* willingness *to undertake to work*, as well as to explore?

and as *P.* was a party to it, and signed it along with *W.*, can there be a doubt that he was bound to *work* the mines, as well as to explore them? and if he was bound to *work* the mines, was not the obligation one which the courts would enforce against him? and if so, has not this contract the ingredient of mutuality, which the contract in *Geiger vs. Green*, is deficient in? The *form* of the instrument by which the undertaking to explore *and work* was made obligatory, is wholly unimportant. 2 *Story Eq.*, 751.

In the decision of the chancellor in the present case, he says: "Although it was the manifest design and object of the defendant to have the minerals upon his farm *worked*, as well as explored, and although, for a small pecuniary consideration he gave *Petherick* full power to make such explorations and works, the only stipulation, on the part of *Petherick*, is, by a certain period, to commence operations for ascertaining, by explorations, the mineral prospects on the said farm. The engagement, therefore, on the part of *Petherick*, was limited to the explorations, and he was not bound, according to my interpretation of the contract, to *work* the mines."

But can this interpretation be the true one? Upon its truth rests the whole of the chancellor's argument. The chancellor says, himself, most correctly, "that the manifest design and object of *Watts* was to have the minerals upon his farm worked as well as explored." Certainly; and does not the contract recite, *as the inducement to its being entered into, the willingness of Petherick to work* as well as to explore. How, then, can it be said, that, having been assented to by *P.* signed by him, and the execution of it commenced by him, the contract does not bind him to work as well as to explore the mines. The chancellor says that it does not, because "the only stipulation is, by a certain period to commence operations for ascertaining by explorations, the mineral prospects," &c. But does the absence of any stipulation as to the time, at which *the working shall begin*, prove, that the agreement contains *no obligation* in regard to working? Unless it does, the chancellor's argument, it is most respectfully suggested, fails. We are sure it cannot have been intended

by him to say, that, unless a *time for beginning* mining operations is fixed, no contract for mining privileges can be made which a court of equity will enforce. As we have already seen, a contract expressly stipulating for time may be made, and yet the time may not be of the essence of the contract; and, therefore, had the time for commencing the working, as well as a time for commencing the exploration of the mines, been fixed, the courts might have held that it was immaterial in a given case. Suppose, for instance, that accident, without injury to *W.*, had prevented *P.* from commencing explorations till the 11th of July 1844, instead of upon the 10th July, the court would not have vacated the contract had it been otherwise good, on that ground. If then, the fixing of a day for the beginning of the working, would not, necessarily, have caused the annulment of the contract had that day not been observed, so the failure to fix a day would not make the contract invalid; and if so, the argument that *Petherick* is not bound to *work* the mines, because no day is named by which he shall begin the working of them, must fall to the ground; and we are left to consider the contract as one binding *P.* to work, as well as to explore, the mines:—naming a day by which the exploration must commence, but leaving the time for commencing the working, after the explorations shall have ascertained the presence of copper, to be determined by circumstances, according to the recognized obligations of the contract.

In another part of his decision, the chancellor quotes the part of the contract already referred to, giving to *P.* the right to make such exploration and works as he may think necessary for such purposes, (referring, as we have seen, to the purposes of exploration *and working*)—as though it was to be inferred from this, that *Petherick* might work or not, as he deemed proper—a feature of the contract, in this view of it, which would deprive the contract, in the chancellor's estimation, of its mutuality.

But if we are right in our position, that the execution by *Petherick* of the contract, the inducement to which was the *working* as well as the exploration of the mines, imposed on

him an obligation to *work*, as well as to explore—then this obligation is one which equity would certainly enforce—requiring from *Petherick* all reasonable diligence; preventing him from playing the dog in the manger; and vacating the contract, if, violating its spirit, he relied upon its terms to uphold him in doing *Watts* an injury:—or the courts of law would give to *Watts* damages, if he chose to resort to them, instead of seeking equity for redress.

But there are yet other points of difference between the contract in this case and the license in the case of *Geiger vs. Green*.—While the agreement with *Green* was without other consideration than the prospective payment for the ore, as raised, the agreement between *Watts* and *Petherick* required that the latter should make, at his *own* expense, and for *Watts'* benefit, those explorations which were to determine the mineral prospects of the farm; for, although the agreement recited the fact, that there was copper and other minerals on the farm, yet the ascertainment of their position, and the mode of getting at them, was evidently of great consequence to the owner of the land. It so happened, that these explorations cost but $60 or $70; but, whatever they might have cost, the rights of *P.* depended upon his making them at his own expense;—that they were sufficiently made for the purpose intended, is not denied; that it cost but little to make them, was fortunate for *P.*, but having made them by the time stipulated, the rights which the making of them gave to him became vested, and a contract, involving mutual obligations, was the immediate result.

The chancellor, in his decision, cites the case in 1*st Schoale and Lefroy*, 18; but he omits a part of the opinion of *Lord Redesdale;* which appears to us to have an important bearing on this case. There is the same omission in the quotation, from the same opinion, which is given in the case of *Geiger vs. Green*. *Lord Redesdale* says, "I have no conception that a court of equity ought to decree a specific performance, *in a case where nothing has been done in pursuance of an agreement*, except where both parties had, by the agreement, a right to compel a specific performance," &c. The omis-

sion consists in leaving out the sentence, "in a case where nothing has been done in pursuance of an agreement," and results from the chancellor's having taken the quotation, probably, from the decision in *Geiger and Green*, and not from the reports. Now, in *Geiger and Green*, the words were doubtless omitted, because, in fact, unimportant; for there, nothing had been done, or was to be done, in pursuance of the agreement, in order to give it a binding character: the agreement there, was, as we have seen, nothing more than a naked and revocable license. But, in the present case, the contract was, by its terms, made to depend on *something that was to be done* by *P.*, which having been done, the case in *Schoale and Lefroy* not only loses its force as an adverse one, but becomes an authority on the other side, on the point that we are now considering, to wit, that the execution of the contract, as far as required by its terms, by *Petherick*, gave him rights under it, which a court of equity will enforce by a decree for specific performance; and thus distinguishing this case, in this particular also, from the case of *Geiger vs. Green.*

Again.—The agreement in the case of *Geiger vs. Green*, was perfected by the execution of the written instrument, which is set forth in the court's opinion. It looked forward to no further act of the parties for its perfection; and its effect was to prevent *Green* from being considered a trespasser, and to settle the rate to be paid for the ore dug by him. But in the case now before the court, *Watts*, "for himself, *his heirs and assigns*, in consideration, &c., agrees to give to *Petherick*, *his heirs and assigns*, full power," &c. The terms employed look to a further act. The object to be accomplished, a conveyance of a mining privilege in perpetuity, binding upon *Watts*, *his heirs and assigns*, could only be accomplished by a deed acknowledged and recorded according to law. The agreement was executory in its character. *P.* was to make certain explorations by a given day;—having made these, *Watts* was to *convey* to him, his heirs and assigns, the right to mine. When the explorations were made, the contract became executed, and *Petherick's* right to the conveyance perfect. The contract was not for the right to *explore*, but the right to mine:

which was to be given when the explorations were made, at *Petherick's* expense, by a given time. That such was the intention and understanding of the parties, is proved by the correspondence, where we find that operations are postponed on account of the non-execution of such a deed:—the failure to execute which is attributed, not to any objection on the part of *Watts*, but to the absence and engagements of counsel. None of the objections taken by the chancellor, were raised by *Watts*, when such a deed was asked for. Even when litigation commenced, the refusal was not put on such objections, by the answer which *Watts* filed under oath. They were afterwards suggested by the decision in the case of *Geiger vs. Green*, in which there was no agreement to give a deed. They are objections which amount, in fact, to a suggestion, that the consideration is inadequate:—not a suggestion made by the party to whom the consideration enures, when called upon by the proceeding in chancery to perform his agreement, but by counsel, in the argument of the cause.

We proceed now to enquire, whether, independent of that case, the present bill for specific performance should be sustained.

In the language of *Chancellor Kent*, adopted by this court in *Geiger vs. Green*, and dwelt on by the chancellor, "unless the court is satisfied that the contract is fair and just, and equal in all its parts, and founded on an adequate consideration, it will not, by the interposition of its extraordinary power, order it to be executed."

Taking this to be the established law, the question is, whether the contract in question is such a contract as is here described?

That it is equal in all its parts, by which we understand mutual in its obligations, we have already argued.

Whether it is fair and just, and founded on adequate consideration, remains yet to be considered:—as well as to shew, that there is not that objectionable uncertainty in its provisions, upon which the chancellor, in his opinion, dwells.

In construing a contract, the court will look to the motives that led to it, and the objects to be effected by it. *Davis vs. Barney*, 2 *Gill and Johnson*, 382. The situation and true

intent of all parties, and *the subject matter*, are to be considered in determining the meaning of a contract. *Hollingsworth vs. Fry*, 4 *Dall.* 345; and other cases referred to in *Chitty on Contracts*, 74. Now, the strongest evidence that we can offer of the fairness, justice and reasonableness of the consideration of the contract, is to be found in the fact, that *Watts* himself, in his answer to the bill, makes no objection to it, as we have already remarked, on any of these grounds. Bear in mind, too, that it was not an ordinary contract for the conveyance of land, or the performance of work, but it was peculiar in its character, relating to a subject about which it is not every one that is conversant, and which was entered into, as *Watts* also states, in his answer, in consequence of the knowledge of its subject matter, which *Petherick* possessed, and which, it is to be inferred, from what he says, was not possessed by every one. When a contract of this kind is sought to be enforced against a party most anxious to avoid it—aided, too, by astute and able counsel, we may well suppose, that if it was unfair, unjust, or wanting a proper consideration, these defences would be made in the answer, unless the party was prevented by the fact, that his answer was under oath. This part of our case, then, we are well satisfied, shall rest upon what we thus think to be the testimony of *Watts* himself.

But, as already said, the chancellor refers to the "*uncertainty*" of the provisions of the contract. This is a defect, apparent, if it exists at all, on the face of the contract, and requires notice here. It may be said, that the argument already applied to the fairness, &c., of the contract, would also apply to its certainty; but, in point of fact, as will appear in a few words of explanation, the contract is as certain, as the nature of the object to be accomplished, required, or properly permitted.

There can be but two objections to the contract, on the ground of uncertainty:

1. That no time is fixed upon for commencing operations.

2. That no amount of work to be done annually, or within a given time, is stipulated.

1. The first of these objections has already been considered.

2. With regard to the amount of work to be done in a given time:—this it would have been impossible to fix in any contract, which a prudent man would have entered into. It would depend upon circumstances wholly uncertain. Copper is often found in masses, and is afterwards traced, by faint indications only, through the earth. The product of a mine may, for a month, yield a handsome return; afterwards, for several months, there may be no return at all for the labor that is expended. The labor of months may be thrown away on the hope, that *indications* will prove true. These are facts of notoriety. Few of the copper mines of this country have answered expectations. Copper mining here is a lottery. If the *prospect* was a good one, no stipulation would be required to induce the miner to push forward, and the seignorage would be large proportionally. If it was bad, a stipulation, which would require him to dig in the earth, without return to himself or the proprietor, would be oppressive and unjust; and even if it were contained in a contract, equity would relieve against it.

In fine, the contract which has been made is the only one which any one, having due knowledge, could, with prudence, make. And we contend that it is sufficient for all honest purposes, inasmuch as the courts will always interfere to enforce the performance of its obligations:—either in equity, by compelling it specifically, or in law, by giving damages for their infraction. In the meanwhile, good faith is always to be presumed; and until W. is, at all events, in a position to insist that the mines shall be worked, which as reversioner he is not, any assumption that bad faith is intended, either by *P.* or his assignee, is utterly gratuitous. Indeed, the very filing of the bill to enforce the performance of the agreement, shows an appreciation of the value of the mine, that forbids the idea that it will be suffered to lie idle and unproductive.

We have thus gone over all the grounds of objection taken to the demand for specific performance, apparent either on the face of the record, or suggested in the argument below, or by the chancellor in his decision. We have shewn:—

1. That the alienage of *P.* is a matter that cannot be inquired into unless by office found; and does not affect

the question now before the court, to which it is wholly collateral.

2. That in point of fact, there was no such abandonment of the contract as *W.* sets up; no such release from its obligations, as he alleges that he gave to *P.*

3. That no abandonment can be inferred from the delay which took place in working the mine, up to the filing of the bill, because the *correspondence* sufficiently accounts for the delay; and because, while *P.* and his assignee were both perfectly willing to accept a conveyance of the reversionary interest, when it was found that *W's* mother had a life estate in the property, yet the absence of all right in *W.* to work the mine in his mother's lifetime, deprived him of the power to insist upon its being done, and made any postponement on the part of *P.* immaterial.

4. That the contract, the consideration of which was the working, as well as the exploration of the mines, was binding upon *P.* according to its terms, as soon as he signed it; that his obligations in regard to it were such as the courts would enforce, and that, therefore, it possessed that essential ingredient of mutuality insisted upon by the authorities.

5. That according to the appreciation of the parties, who were best qualified to judge, the terms of the contract were fair and just, and the consideration sufficient; and that there was all the certainty in its terms which the nature of its subject matter admitted; and all that the defendant below, who resisted its performance, required, even after the commencement of the present litigation.

Upon these views we ask a reversal of the chancellor's decree.

By T. Parkin Scott for the appellee, who contended:—

1. The complainant, or his assignor, is not bound by the terms of the agreement to work the mines, but only to ascertain, "by exploration, the mineral prospects on the said farm." The agreement was drawn by *Petherick*, and he seems to have endeavored to secure to himself, "his heirs and assigns," full control over the mines, without incurring any obligation to

work them, but only to explore;—thus holding out to the defendant, the delusive hope of revenue, with which to pay his debts, without the power to gather it.

The agreement is, in this particular, almost verbatim with the agreement in the case of *Geiger vs. Green*, decided by this court at December term 1846, and that case decides this. The decree dismissing the bill must be affirmed.

The counsel for the appellant seem to have felt the force of this authority, and therefore they have devoted themselves principally to distinguish the cause before the court, from the case of *Geiger vs. Green*.

It is most true that the agreement does recite, that *Watts* "is desirous to have the same (the mines) properly explored and worked," and it recites, that *Petherick* "is willing to undertake such exploration and working." But this agreement no where binds *Petherick* to work the mines. He drew the agreement, and made no such stipulation on his part. To *Watts* it is immaterial, whether this omission was by accident or by design, the effect is the same to him. But let us suppose that *Petherick*, and *Tyson*, his assignee, are bound by the terms of this agreement to work the mines; then the question arises, to what extent are they so bound to work the mines? *Petherick* was sometimes kept away by other business, he had to go to *Virginia;* other and important business kept him away, coal mining at *Pottsville* occupied nearly the whole of his time, and produced delay; his counsel, *Mr. Stewart*, neglected to attend to the matter. His *English* friend would not furnish funds for small transactions. Business at *Pottsville* prevented his making arrangements for carrying on the operations at *Bare Hills*.

Thus it seems that more profitable engagements elsewhere kept *Petherick* from *Watts*' copper mines. He knew he was not bound to work them; or, if he was bound, it was only to a nominal extent, that would not yield *Watts* any revenue; and yet *Petherick* had, as he supposed, secured to himself the exclusive privilege to work the mines. *Tyson* also may have more profitable business,—he may have other mines, and not wish to overstock the market, whilst poor *Watts* is to suffer.

Is there any mutuality in this contract?

The appellant's counsel seems to think, that *Watts* is precluded from making this objection of the want of mutuality in the appellate court, because they suppose this defence was not taken in the answer, although they admit it was relied on in the argument below. The appellee's counsel conceives that his opponents are mistaken, both in regard to the fact and the law. It is true, that in the answer this defence was not taken by the use of the words "no mutuality," in speaking of the agreement: but the defence was substantially taken by the defendant setting forth the contract, and the circumstances under which it was made, and then denying that he is bound at law or in equity by the said supposed contract, to execute any deed. But even if this defence had not been thus taken by and in the answer, the want of this "mutuality" is patent on the face of the agreement; and the whole bill and the record shews a want of equity in the prayer of the bill and the relief sought. To grant the prayer of this bill, would not be to do equal justice. 8 *Cranch*, 471, *Pratt vs. Carroll, page 222 of 3 Peters' Cond. S. C. Reps.* 1 *Fonblq.*, 189, *note (i.)* *Story Eq. Juris. S.* 742.

It is objected by the appellant, that *Watts* was only entitled to the reversion of this property, after the death of his mother. There can be no dispute on this point;—tenant for life has no right to open new mines, without the assent of the reversioner or remainder man; and the reversioner or remainder man has no right to work the mines during the continuance of the life estate, without the consent of the tenant for life. But *Watts* asserts that he had the consent of his mother; and certain it is, he commenced the explorations, and opened the mine under *Petherick's* directions, without objection from his mother; and there is no allegation that she did object; and no allegation of any offer to prosecute the work, either by *Petherick* or by *Tyson*. *Story's Eq. Juris., sec.* 771; and from the fact that the explorations and opening of the mine was done whilst she was in possession, and without objection, and from the attendant circumstances and the relationship of the parties, we may reasonably conclude that she gave her assent.

Time was of the essence of this contract. *Watts* was in debt; his debt was about to become due and payable, and he wanted means to pay it, as well as revenue for support. It is manifest, as well from the nature of the agreement,—the explorations,—the frequent regrets and apologies of *Petherick* in his letters, and his promises to send the miners on to the work,—that when it was made, *Watts* contemplated an immediate working of the mines. It would have been better for *Watts* not to have known of his hidden wealth in the bowels of the earth, if he could not make it available. Our worthy opponents had more profitable business on hand.

2. *Petherick* is an alien, and never resided in *Maryland.* The defendant, therefore, insists, that *Petherick* could not make a valid transfer of real estate to *Tyson.* It is not denied but that an alien may purchase, and hold until office found; but he purchases for the benefit of the king; here, of the State, and he cannot transfer.

"If an alien christian, or infidel, purchase houses, lands, tenements or hereditaments, to him and his heirs, albeit he can have no heirs, yet he is of capacity to take a fee simple, but not to hold; for upon an office found, the king shall have it," &c. *Co. Litt.*, 2 *b.* 1 *Thos. Co. Litt.*, 91.

"Many that have capacity to take, have no ability to enfeoff, &c., as aliens born," &c. *Co. Litt,* 42 *b.* 1 *Thos. Co. Litt.*, 92.

The *Supreme Court of the United States,* in the case of *Fairfax's Devisee vs. Hunter's Lessee,* reported in 7 *Cranch,* and also in 2 *Peters Cond. Reps., page* 627, say, that an alien "may convey to a purchaser—although *Co. Litt,* seems to the contrary—yet it must probably mean that he can convey a defeasible estate only, which office will divest. This court, in *Buchanan vs. Deshon,* 1 *H. & G.*, 289, has said: "An alien may purchase lands, and hold them against every one, except the State, until office found, or until the government shall exercise its authority over them." If, then, *Watts* was to convey either to *Petherick,* or to *Tyson,* his assignee, the estate conveyed could be claimed by the State, and thus *Watts* would be involved, and defeated or delayed in the enjoyment

of the revenues from his mines, contemplated under this agreement. A court of equity, in its sound discretion, will not decree a specific performance of such an agreement, even if there was a "mutuality" in the contract, which there is not.

The court will observe that our case is entirely clear of the objection in the case of *Jones vs. Belt*, 2 *Gill*, 106. *Watts* does not object because he cannot give that which he stipulated for; but he objects because the contract, as drawn by *Petherick*, is not equitable; and the complainant has not performed his part, and may not, most probably will not, be able to perform; and because now, he, *Watts*, cannot obtain that consent of his mother and his mortgagee, which he once could have obtained, and which has been defeated by the acts of the complainant, who has bought up the mortgage.

3. If this agreement is not obnoxious to the objections of want of mutuality, and of incapacity on the part of the said *Petherick* and *Tyson* to perform it, yet this court will not now decree a specific performance against the appellee; because the delays, the failure so far to perform, or to *offer* to perform on the part of *Petherick*, and of *Tyson*, and the acts of *Petherick* in neglecting this, to attend to other more profitable business, amount in fact to an *abandonment* on their part, and have already occasioned much loss in revenue to *Watts*, withholding the means, with such revenue, to enable him to pay his debts, and particularly such mortgage debt, bought up and held by *Tyson*. The letters of *Watts*, produced by *Tyson*, shew a constant and continued complaint of the delay; and the letters of *Petherick* admit it, and attempt to excuse it, by stating other business engagements. *Tyson* is bound by *Petherick's* acts and declarations. 12 *Gill & Johns.*, 35, *Clary vs. Grimes*. *Tyson* does not pretend to have sustained any loss. He knew of the difficulties in his way before his purchase from *Petherick*. He has, perhaps accidentally, misstated the dates and terms of the agreement. He has endeavored to deter others from contracting with *Watts*, misstating the dates of the contract, by alleging it to have been in 1840, instead of 1841. He did not pay any thing to *Petherick* for the contract; at least the assignment does not state any con

sideration, and there is no proof of his having paid any thing. He has no equity to sustain his claim.

For these reasons the appellee's counsel contends, that the decree of the chancellor ought to be affirmed.

MARTIN, J., delivered the opinion of this court.

It appears from the record in this case, that a bill was filed in *Baltimore* county court, as a court of equity, on the 24th of June 1846, by the appellant, as the assignee of *Thomas Petherick*, against the appellee, for the specific performance of an agreement, alleged to have been made between the appellee and *Petherick*, in June 1844.

The agreement is in the following words:

"Whereas *Mr. Thomas B. Watts*, of *Bare Hills*, near *Jones Falls*, in the county of *Baltimore*, in the State of *Maryland*, has, on his farm at *Bare Hills*, above mentioned, copper, and other minerals, and is desirous to have the same properly explored and worked; and whereas *Thomas Petherick*, residing at *Philadelphia*, in the State of *Pennsylvania*, is willing to undertake such exploration and working, the said *Thomas B. Watts* for himself, his heirs and assigns, in consideration of one dollar, paid to him by the said *Thomas Petherick*, agrees to give to the said *Thomas Petherick*, his heirs or assigns, full power to make such exploration and works on the said farm, as he, the said *Thomas Petherick*, may think proper for such purposes, and for the reduction and conversion of the minerals, and to carry away and to dispose of the minerals, subject to the following conditions, viz:

"That the said *Thomas B. Watts* reserves to himself, his heirs or assigns, a seigniorage of one full fifteenth part or share of all such minerals or metals, after the same shall have been rendered fit for smelting, reduction, or use, free and clear of all expenses whatever. That the said *Thomas Petherick*, his heirs or assigns, shall, on or before the 10th day of July next, commence proper explorations, for the purpose of ascertaining the mineral prospects on the said farm.

"That if the seigniorage, above reserved, be found to be less than the average rate of seigniorage, or dues paid to the land

owners, on the ores raised in the great copper mining district of *Cornwall*, in *England*, such seigniorage reserved shall be increased to such average rate, to be determined by arbitration."

There is then a provision in the contract, that *Petherick* shall furnish the appellee with satisfactory references as to his respectability.

The case was removed to the court of chancery. The only testimony taken under the commission issued in this cause, was documentary in its character, and the controversy was submitted to the chancellor, upon the bill and answer, the two agreements, the receipts, the assignment to the appellant, and the correspondence. Upon the 2nd of April 1847, he passed a decree dismissing the complainant's bill, and the correctness of the opinion thus pronounced by the chancellor, is the question raised for our determination on this appeal.

In the case of *Geiger against Green*, decided by this court, at the December term 1847, a bill was filed for the specific execution of a contract, entered into between *Charlotte C. D. Owings* and *Richard Green*, bearing date the 10th of December 1838. The agreement was as follows:

"I hereby grant to *Richard Green*, the privilege of digging and moving the ore on that part of my place joining *Welderson's* and *Price's*, at twenty-five cents per ton, for the privilege of ground, leave also to build a house on said land, the workmanship to cost one hundred dollars, the materials to be got on my land, at said *Green's* expense."

In the examination of this agreement, the Court of Appeals said:

"It is true, that as this mine was worked, and ore raised from it by the appellee, an obligation to pay twenty-five cents for every ton that was produced, would be created. But the contract grants to the appellee the mere privilege of digging ore, and is not compulsory in its character; a privilege to be exercised or not, at his discretion; imposing no corresponding obligations; and if the appellee had considered the agreement into which he had entered injurious, and refused to work the mine, it is apparent from every part of this paper, that the proprietor possessed no power to enforce, in a court of equity, an observ-

ance of the contract. The practical operation of an agreement of this description, is, that while the appellee may use the mine, if he finds it productive, he may refuse to do so, upon discovering that his purchase is disadvantageous, and the owner of the property would be deprived for years of the revenue, which, under other circumstances, might be derived from it."

The court then say:

"A contract so unequal in its stipulations and bearing, which binds one party, while it leaves the other unfettered, as it respects the observance of its terms, in which there are to be seen no mutual or reciprocal engagements, and which must be regarded therefore as unreasonable and inequitable, can never be enforced in a court of equity."

When speaking of the agreement between the appellee and *Thomas Petherick*, the chancellor says:

"Although it was the manifest design and object of the defendant, to have the minerals upon his farm worked, as well as explored, and, although for a small pecuniary compensation, he gave *Petherick* full power to make such explorations and works, the only stipulation on the part of *Petherick*, is, by a certain period, to commence operations for ascertaining, by explorations, the mineral prospects on the said farm. The engagement, therefore, on the part of *Petherick*, was limited to the explorations, and he was not bound to work the mines."

We think, the interpretation placed upon this contract by the chancellor, is unquestionably correct.

The agreement recites, the desire of the appellee to have the minerals upon his farm explored and worked, and the willingness of *Petherick* to explore and work them, and that the appellee therefore grants to *Petherick*, in perpetuity, full power to make such explorations and works, as he may think proper for such purposes, and for the reduction and conversion of the minerals; and yet, when that part of the contract is examined where the conditions are expressed, it is discovered, that *Petherick* has only stipulated for the explorations of the mineral prospects of the farm, on or before the period designated in the agreement.

As in the case of *Geiger vs. Green*, if *Petherick* had worked the mines, the appellee would have become entitled, by the terms of the contract, to a seigniorage of one-fifteenth, clear of all expenses; but if *Petherick*, in the exercise of the privilege granted by the agreement, refused to work the mines, it would be impossible for the appellee, without the interpolation into the contract of new conditions and stipulations, to have coerced its execution through the instrumentality of a court of equity.

After carefully collating these contracts, we think, the case at bar cannot be distinguished from the case of *Geiger against Green*. And that the agreement now under consideration, is obnoxious to the same objection, which was held to be fatal in the case to which we have referred.

Upon this ground, we affirm the decree.

As we consider the case before us concluded by that of *Geiger vs. Green*, it has become unnecessary to express an opinion upon the other points raised in the argument of the cause.

DECREE AFFIRMED.

ROBERT H. CARTER AND WIFE, AND MARY M. SMITH, *vs.* MARCUS DENNISON.—*December* 1848.

On the 20th of October 1846, *J S* applied for relief under the insolvent laws, to the commissioners of insolvent debtors for the city and county of *Baltimore*, who granted him a final discharge, appointed his permanent trustee, and transmitted the proceedings to *Baltimore* county court. His real estate was then sold by order of said court, and the proceeds brought in for distribution. The cause was then referred to the auditor in insolvency, with directions to give notice to the mortgage and lien creditors to file their claims before a certain day, and to state accounts appropriating the funds to their payment. The auditor, in account B, applied a large sum to *D's* mortgage, filed in pursuance of said notice, being first in priority, dated in 1840, and purporting to secure the sum of $16,000, loaned for the term of ten years; but, by an adjustment made between *D* and the trustee, on the ground of alleged usury, the sum actually loaned was computed at $11,495, with interest from 1840. By this application, the fund was exhausted before reaching the mortgage of the appellants who thereupon filed the plea of usury against *D's* claim, which in account C was excluded. These two accounts being submitted, *Baltimore* county court ratified the first,

allowing the claim of *D*, as adjusted, and rejected the second. Upon the motion to dismiss the appeal from this order, it was HELD:

That the order from which this appeal was taken, being one from the county court, in the exercise of its special jurisdiction over the estates of insolvent debtors, from which no appeal will lie, the motion must prevail.

By the act of 1805, ch. 110, and its supplements, the whole administration of the property of the insolvent, beginning with the sale and ending in distribution, is devolved upon the county court through their trustee, and their judgment in all matters appertaining to it is conclusive: because these are the exclusive subjects of the special jurisdiction conferred by that act.

The institution of a court of commissioners of insolvent debtors, by the act of 1816, ch. 221, and its supplements, was only designed to relieve the county court from the pressure of its increasing business, imposed by this extensive class of cases. It was but an ancillary tribunal, bound to report and return all its proceedings, and still subject, to *Baltimore* county court.

The object of the act of 1835, ch. 235, was to authorise *Baltimore* county court, *ex officio*, to require from the trustees of insolvents, who should "thereafter apply for the benefit of the insolvent laws," an annual report of the funds belonging to their trust, with a view "to cause distribution to be made among the creditors."

The 1st sec. of the act of 1836, ch. 133, extended this power to cases "pending in said court," in which the trustees had not distributed the fund, giving to such trustees, in "*cases then pending*," and *limited to such*, the right to apply "to said court, or some court of equity," for an audit, and directions to distribute or invest the funds.

The true construction of the provision in the 2nd sec. of this latter act, "that the power of the court to appoint an auditor "in insolvent cases, "shall be *concurrent with that of the court of equity*," is, that *Baltimore* county court shall have the power to appoint an auditor, in the investigation of insolvent cases, to the same *intent* that courts of equity appoint an auditor in the course of their equity jurisdiction.

But when the same section further confers, powers "*concurrent with the courts of equity in the distribution of the funds of insolvent debtors*," it assumes a power to exist which is not within the scope of chancery jurisdiction, and confers nothing, therefore, the provision is a nullity.

From a special limited jurisdiction, no appeal lies to any other tribunal, and this rule applies to the insolvent courts of this State, as courts of limited jurisdiction.

Upon the merits, it was HELD, that under the statute of this State against usury, there can be no recovery upon an usurious contract, in any proceeding instituted by the usurious creditor, either at law or in equity. If he becomes the actor and originator of the proceedings, he must fail as plaintiff; because there is no forum wherein he may enforce an agreement, declared by the law to be tainted and forbidden.

But where the debtor himself seeks relief, and brings his usurious creditor, with his contract, into a court of conscience, relief will only be extended

to him, on his paying, or offering to pay, the principal and legal interest of the sum due; upon the principle, that he who seeks equity, to obtain relief, must do equity.

In this case, where the creditor was compelled by the court, to file his mortgage before it was due, and was placed in his present position by the act of the law, he cannot be regarded as the *actor;* but the subsequent mortgagees, who interpose the plea of usury and demand relief against him on this ground, are the actors, and their case is fully within the spirit, if not the letter, of the rule, that requires equity first from them.

It is the duty of a court of equity, in a case like this, to look at all the circumstances, and if the *status* of the party before them is involuntary, to assign him an equitable position in court, in relation to all the other parties, and not to make him *the actor*, to his own prejudice, where his standing in court will bear any other more favorable construction.

Appeal from *Baltimore* county court.

On the 20th of October 1846, *John Spear Smith* applied to the commissioners of insolvent debtors of the city and county of *Baltimore*, for the benefit of the insolvent laws. He was granted a final discharge in March 1847, having reported among his creditors. "*Marcus Dennison* for $15,000, secured by mortgage, part, if not all, in dispute," and *Margaret* and *Mary Smith*, $20,000. *John Glenn* was appointed his permanent trustee, and gave an approved bond on the 20th of October 1846. On the 3rd of November, the trustee was directed by *Baltimore* county court, to which the proceedings in insolvency had been transmitted, by the commissioners aforesaid, to sell the real estate of the insolvent. The sales made in pursuance of this order, and which were duly ratified by the court, amounted to $33,871.95. The trustee, in his report of the 7th of May 1847, states, that "the whole of the real estate is incumbered by mortgages and judgments, to more than its value," and prays that "special notice may be given to the several mortgagees to file their claims." With this report the several liens are filed as exhibits, among which, the first in date, and designated by the auditor in his account B, as claim No. 1, is a mortgage from *Margaret Smith* and her trustee, of the first and second part, to *Marcus Dennison* of the third part, dated the 15th of December 1840. This mortgage recites, that "whereas at the instance and request of the party

hereto of the first part, the party of the third part has this day lent to her the sum of $16,000; for the term of ten years, at an interest of *six per cent. per annum*, payable quarterly, for which said sum of $16,000, there has been passed and delivered to the party of the third part a promissory note, of even date, herewith drawn by *John Spear Smith*, (son of said *Margaret*,) to, and in favor of, the said *Marcus Dennison*, or order, payable at ten years after date, and for legal interest on said sum, there have been passed and delivered to the said *Marcus* forty promissory notes, dated and drawn as aforesaid, for $240 each, payable quarterly in succession." For securing these notes, the mortgage conveys certain property situated in *Baltimore* city to said *Dennison*, which, by the will of said *Margaret*, was devised to the said *John Spear Smith*, and upon her death, in 1843, come into his possession. Upon the back of this mortgage is the affidavit of *Dennison*, that the amount due on the 5th of December 1846, was $15,614.25, and also the following agreement:

"It is agreed, that in settlement of *Marcus Dennison's* mortgage, on the estate of *John Spear Smith*, that the amount due to him is adjusted at $11,495, with interest from 15th day of December 1840, till the day of sale.

JOHN GLENN, Permanent Trustee.
DAVID STEWART,
Solicitor for *M. Dennison*.

BALTIMORE, *Nov. 12th*, 1846."

After several intervening incumbrances, there is a mortgage, (designated as claim No. 6,) from *John Spear Smith* to *Margaret Carter*, wife of *Robert Hill Carter*, and *Mary M. Smith*, dated the 19th of January 1846. This mortgage recites, that "whereas the said *John Spear Smith* is, and stands justly indebted to the parties of the second part in the sum of $20,000, being a portion of the proceeds arising from the disposition of certain ware-houses on *Spear's* wharf, belonging to the parties of the second part, and appropriated to the use of the said *John Spear Smith*," and, to secure the payment of this sum, conveys to them the property previously mortgaged to *Dennison*.

The cause was then referred by the court to the auditor in insolvency, who was directed to give notice to the creditors of the insolvent to file their claims, and to state accounts between the trustee and the creditors of the insolvent. The auditor reported by account B, as due the appellee, $15,614.05, and *Margaret Carter* and *Mary M. Smith* each $31.33; and by account C, stated at the instance of the counsel for the appellants, and rejecting the claim of the appellee entirely, the sum of $15,676.71 was allotted to said *Margaret Carter* and *Mary Smith*. On the 27th of May 1847, the court, by agreement of parties, ratified account B, except as to claim No. 1, and directed the appellee to file further proof in support thereof. After the filing of this additional proof, the appellants, on the 21st of June, filed separate pleas, in which they allege, that the claim of the appellee is on the note for the principal sum of $16,000, filed with his said claim, and the notes for the interest on said principal sum; and that said notes, and the mortgage given to secure the same, were made and delivered to the appellee, upon an usurious and unlawful contract, entered into after the 3rd day of October 1704, and they severally plead the act of 1704, ch. 69, in bar of said claim and every part thereof. They also set forth in their said pleas, that while said notes and mortgage, to secure the sum of $16,000 and the interest thereof, were given to the appellee, only the sum of $11,495.05 was in fact loaned by him to the insolvent, in consideration of said notes and mortgage, and that but for the usury of said transaction, only the last named sum, with interest from the 15th of December 1846, would be due to the appellee. And the appellants, at the same time, severally excepted to the appellee's claim, No 1, in account B of the auditor, as being void on the ground of usury, and in their exceptions, again specially plead the usury thereof, in opposition thereto.

To these pleas the general replication was filed. And, by agreement, the testimony taken before the auditor in reference to the claim of the appellee, No. 1, was agreed to be read at the hearing of the auditor's report by either party, as if taken after, and in reference to the pleas and exceptions of the appellants. This testimony clearly establishes the fact, that the

claim of the appellee was founded upon an usurious and unlawful loan, made by him to the insolvent.

Upon this agreement and testimony, the claim of the appellee, with the pleas and exceptions of the appellants thereto, and the replications of the appellee, were submitted by the solicitors of the respective parties, and, on the 24th of June 1847, the court adjudged and ordered, that the exceptions and pleas of the appellants should be overruled, and the claim of the appellee, as stated in account B, should be finally ratified and confirmed, and that account C should be rejected. From which decree the appellants appealed.

The cause was argued before Spence, Martin, Magruder and Frick, J. On motion to dismiss the appeal and on the merits.

Brown and Brune for the appellants, contended:

1st. That an appeal lies from the decree of *Baltimore* county court, of the 24th of June 1847.

2nd. That said decree should be reversed; because the appellee's claim being founded on an usurious and unlawful contract of loan, made between him and the insolvent, was, by such usury, rendered null and void, and the appellee was thereby debarred from setting up said claim against the insolvent, and also from recovering his said claim, or any part thereof, out of the proceeds of the property mortgaged to secure the said loan.

Under the second point, they argued:

1st. That the note and mortgage, filed by the appellee as the evidence of his claim, were given upon an usurious and illegal contract, by reason of which he would be prevented from recovering on said note and mortgage, independently of the provisions of the act of 1845, ch. 352.

2nd. That the objection and defence of usury to the appellee's claim have been properly taken and pleaded, according to the requisitions of the law previous to the act of 1845, as well as under that act, even if its provisions should be held to extend to this case.

3rd. The appellants being subsequent mortgagees of the property affected by the usurious mortgage, may plead the usury affecting the mortgage of the appellee, so as to bar him from asserting his claim to, or lien upon the proceeds of the mortgaged property.

4th. The principle of courts of equity requiring a party, who seeks in them to be relieved from an usurious contract, to pay or tender the amount actually loaned by the usurious lender, does not apply to this case, so as to make valid the claim of the appellee in whole or in part.

5th. That the provisions of the act of 1845, do not apply and were not intended to extend to a case like this.

6th. That if it should be held that the act of 1845, was intended to extend to a case like this, yet as the appellants, for a valuable and legal consideration, acquired their lien on the mortgaged property of the insolvent before the passage of that act, and when, by reason of the usury in the appellee's contract with the insolvent, the mortgage previously given to the appellee had no validity in law to give the appellee a lien on the property mentioned in said mortgage, or its proceeds, but, on the contrary, was declared by the law to be utterly null and void, the said act, under these circumstances, should be held to have no operation to make valid the security of the appellee, and invalidate the security of the appellants; because, in so operating, it would not only divest or impair legal and vested rights, but, at the same time, destroy the security and violate the obligation of the contract between the appellants and the insolvent, and would therefore be repugnant to the fundamental principles of right and justice, unconstitutional and void.

C. J. M. Gwinn and David Stewart for the appellee, contended :

1st. That under the circumstances of this case, the appellee is entitled to be reimbursed and paid out of the fund, the actual amount of his advances to the insolvent.

2nd. That the decision of *Baltimore* county court, acting upon the distribution of the estates of insolvent debtors, is final

and conclusive, and that no appeal lies therefrom to any other tribunal.

MAGRUDER, J., dissented in part, and delivered the following opinion:

Until the passage of the act of 1804, for the relief of insolvent debtors, all applications were required to be made, by persons of that description, to the chancellor, and he alone was authorised to act upon such applications, and to grant the relief which was sought. The proceedings, preparatory to to the discharge, were very much as now, except that the chancellor only could order or sanction them.

These annual insolvent acts, created an insolvent's court, of which the chancellor was the judge, as he was of the land office, received compensation for his services therein, distinct from the salary paid to him as chancellor and judge of the land office, and had power to do some acts *ex officio*, and to frame issues for the trial of facts, when he thought them necessary. These were powers conferred upon him by act of Assembly, and a grant of them would have been unnecessary, if, in acting upon the application of an insolvent, he was acting as chancellor, and exercising any branch of chancery jurisdiction.

The necessary consequence of any application to him and discharge of the insolvent, was, that the estate given up by the insolvent, created a trust fund in the hands of his trustee, who possessed the same powers, had to perform the same duties, and was responsible in the same way, that any other trustee for the benefit of creditors is. To the creditors the trustee was responsible, and, in the chancery court, might be made to render an account and complete his trust, and this without any additional powers conferred, by the insolvent or other laws, upon that court. To compel trustees, (no matter whether appointed by the chancellor, in consequence of an application by a debtor for his discharge under the insolvent law, or by the debtor himself, by deed, conveying property in trust for the benefit of his creditors,) to discharge their trust, was, and always had been, an acknowledged branch of chancery jurisdiction.

The regular course of proceeding when a *cestui que trust*, or any person interested in the trust fund, wished the trust to be completed, was, to file a bill, and this would be the commencement of a regular chancery suit, to be conducted as such, and, in the course of time, to be ended in a decree, by the chancellor distributing the trust fund. From this decree, any party who thought himself aggrieved, no doubt had a right to appeal, as well as from any other decree.

If, then, the chancellor was still the person to receive insolvent's applications, and grant discharges, and the application in this case had been made to him, and he had passed the order now appealed from, there can, it is believed, be no doubt that an appeal would lie from that order.

The *insolvent jurisdiction* has been taken from the chancellor, though without taking from him any portion of his jurisdiction in cases of trusts, and to that court the parties interested in this trust fund, must have applied for relief, if no such power to grant them relief had been conferred upon any other tribunal. It would not, of necessity, belong to the tribunal which granted relief to the insolvent.

The county courts might have been invested with the power to appoint a trustee, take his bond, and grant a final discharge, without any power to call that trustee to account, and had certainly no such power in 1804. A law conferring upon them that power, would be an enlargement of their equity jurisdiction. This power, no doubt, has been conferred by a later act of Assembly, (1814, ch. 94,) giving to the county court, very extensive equity powers indeed.

It is alleged, that the power to distribute the trust fund among the creditors, as well as the power to grant the discharge, is in the county courts, and it seems to be thought by some, that in these acts, they are sitting as a court of common law. This can scarcely be true, nor is it true, as thought by some, that this is a common law court, possessing some chancery powers. It is one court, possessed of common law and chancery jurisdiction, but it would be as correct to say, that it is a court of equity, possessed of some of the powers of a court of common law, as to call it a court of law, exercising occasionally equity

powers, when "sitting as a court of equity." These courts are not exercising common law jurisdiction, when settling an account between the trustee of an insolvent and the creditors, or ordering the trustees to render an account of the trust fund, and a common law court would find some difficulty in exercising such powers, even if the law directed them, in the discharge of these duties, to act as a common law tribunal. In 1*st Bland*, 67, it is said: "If the legislature directs any thing to be done, it either provides the means to be pursued to effect its object, or it is partially or wholly silent as to the manner of proceeding. If the prescribed means are such, as can only be exercised at common law or in equity, then the one or the other of those tribunals must be clothed with exclusive jurisdiction accordingly, or the enactment may be such, as to allow them to have concurrent jurisdiction. But, if its nature be such, that the prescribed mode can be executed by neither, or the right given be such, that, according to their several limited and settled modes of proceeding, neither of them can grant proper redress, they cannot, in any way, supply the deficiency; because, even upon *English* authority, a court of justice cannot be permitted, in any case, to *legislate;* and because, by the constitution of our republic, the three departments having been directed to be kept forever separate, the judiciary has been expressly excluded from every species of legislation, and is precluded from supplying any omissions of the legislature, however obvious and necessary it may be for attaining the object in view." *Lord Eldon*, in 2*nd Jacob & Walker*, *p.* 371, remarks: "If the powers of both, (equity and common law,) taken together, can give the king's subjects nothing but an action for damages, it is a defect which, whether it proceeds from mistake on the part of the legislature, or, if I may presume to say so, from negligent inattention, no court can supply. The legislature has not entrusted that authority to courts of justice. It is not said, that they can legislate, but that the act is to be carried into execution by the known rules of law and equity. What the legislature has directed to be done, or may have prohibited, the courts, as far as their known rules and principles will permit, will endeavor to enforce; but if their

known rules and principles will not supply a remedy, if the legislature has mistaken its way, no court of justice can supply the deficiency."

The act of 1785, chap. 33, enables land-holders to have their lands marked and bounded. That law "provides the means to be pursued, to effect the object." If, however, this had not been done, if the law had merely authorised an application to the county courts, and had directed the courts, when such applications were made to them, to proceed to have the land marked and bounded, "the rules of the courts of common law or of equity, would have been insufficient to assure to the citizen any right which it was intended that he should derive from that law:" the law would have been a dead letter, until the General Assembly made provision for carrying it into effect; yet such law, perhaps, would not have been more defective, than an act of Assembly to direct a court, without equity jurisdiction, to settle up insolvent estates. A court of common law, perhaps, might, by the old action of account, afford a partial, but it would have been a very inadequate remedy. The mode to be pursued, in order to a settlement of the estate of an insolvent applicant, is precisely the same, as it would be if the debtor, instead of applying for a discharge under the insolvent laws, had made an arrangement with his creditors, and had conveyed his property, or a portion of it, to an individual, in trust, to sell the same, and appropriate the proceeds of sale to the payment of his debts. In such a case, any party aggrieved may appeal, and I can perceive no reason for denying to a party, who supposes himself to be aggrieved, in the settlement of an insolvent's estate, the same right of appeal.

In the case of bankruptcy in *England*, this right of appeal may be denied, but our ancestors were not very partial to the bankrupt system of *England*, and are not understood to have adopted any provision peculiar to it. The reasons which exist in *England* for denying in any such cases a right of appeal, do not exist here; and here, the right of appeal as given by law, cannot be abridged by provisions to be found in the bankrupt law of *England*, or in that which has existed in the *United States*.

My opinion then, is, that the legislature possesses the power, and may at any time exercise it, to take the right of appeal from all parties interested in cases like this; but, until denied by the legislature, the right exists, and I can discover no law which excepts cases of this description, from the remedy by appeal given to parties aggrieved, by the decisions of the county courts, sitting in those cases, not as courts of common law, but as courts of equity. I am therefore for entertaining the appeal.

My warrant for affirming the decree of the court below in this case, I find in *Scott vs. Nesbit*, 2*nd Bro. Chan. Rep'ts*, 640.

Frick J., delivered the opinion of this court.

The present appeal is from an order of *Baltimore* county court, passed in certain proceedings had before that court, in the case of *John Spear Smith*, an insolvent debtor, in relation to the distribution of the funds arising from the sale of the real estate belonging to the insolvent, among the various lien and mortgage creditors of the said insolvent.

The first mortgage in priority, dated in 1840, is from *Margaret Smith*, the mother, (who at that time was the owner of the property,) to the appellee, and purports to be for the sum of $16,000, lent and advanced to her for the term of ten years, at an interest of six per cent. per annum, payable quarterly; for which sum the said *John S. Smith* gave his promissory note to the appellee, together with forty other notes, covering the interest at the respective periods at which it should become due and payable.

*John Spear Smith*, subsequently acquired the property by devise from his mother, and mortgaged the same to various other creditors; and among these, last in order, to the appellants, *Mary Carter*, wife of *Robert Hill Carter*, and *Mary M. Smith*, his daughters, for $20,000, "a portion of the proceeds of certain property belonging to the appellants, and appropriated to the use of the said *John Spear Smith:*"—as appears by the mortgage, filed as part of the record in this cause.

On the 20th of October 1846, *Smith* applied for the benefit of the insolvent laws; and *John Glenn*, regularly and duly appointed his trustee, having made sale of the real estate, so

belonging to said *Smith* at the time of his application, brought the proceeds into *Baltimore* county court for distribution.

In the reports of the sales so made, the trustee states to the court, that the whole of the real estate of the insolvent is encumbered with liens and mortgages to more than its value; and prayed a special notice to such lien creditors to file their claims, for the purpose of having their liens settled and paid. The court passed an order, referring the reports to the auditor; and requiring him to give notice by advertisement, to the mortgage and lien creditors, to file their claims before a certain day; directing him, also, to prepare an account, appropriating the fund in the hands of the trustee, to the payment of the mortgage and lien creditors.

The several mortgages and liens being filed with the auditor, in compliance with this order, he proceeded to state the account, applying the fund, in the first place, and in the order of priority, to the payment of the claim of the appellee; and then, in succession, to the other mortgages, in the order of their date, so that on reaching the claim of the appellants, the fund was exhausted, and they were excluded from all participation.

The appellants hereupon filed against the appellee's claim, the plea of usury, in due form; claiming, on that ground, another audit and account, to have the appellee excluded from the distribution, and themselves allowed to come upon the proportion of the fund, which would result from his exclusion. This account was accordingly stated, shewing, upon the rejection of the appellee's claim, a balance applicable to appellants' claim, of $15,676.

Before the statement of the first account, and prior to the sale of the property, on the ground of this alleged usury, an adjustment had taken place between the trustee and the appellee; and by agreement, the sum actually paid and advanced was computed at $11,495, with interest from 1840, and conceded to be fairly due by the trustee.

On the part of the appellants, testimony was taken to establish the usury; and thereupon, the two accounts being submitted, the court below ratified the first account, allowing the appellee his claim, as adjusted by the agreement with the trus-

tee, and rejecting the second account. From this order the appellants appeal, and contend: "That the claim being founded on an usurious and unlawful contract of loan, between the appellee and the insolvent, was thus rendered null and void; and that, thereby, the appellee was debarred from setting up any claim against the insolvent, or from recovering any part thereof out of the proceeds of the property mortgaged to secure said loan."

The appellee, on the contrary, maintains, that he is entitled under the circumstances of the case, to be reimbursed and paid out of the fund, the actual amount of his advances to the insolvent; and that the decision of *Baltimore* county court, acting upon the distribution of the estates of insolvent debtors, is final; and thereupon has moved that the appeal taken by the appellants be dismissed.

The majority of this court are of opinion that this motion must prevail, because the decision of *Baltimore* county court in the premises, is final and conclusive.

It arises out of a proceeding, originating and progressing entirely on the insolvent debtors' side of that court, under the special jurisdiction given in such cases by the act of 1805, ch. 110, and its supplements; and, in the course of distribution of the estate of an insolvent, under that act. By its provisions, the application of the party is to be made to the county court, and upon complying with its requirements, the court is to grant him a discharge. He is required to execute to a trustee appointed by the court, a deed of conveyance of all his property; and under their direction, the trustee is to make the sale thereof, and the distribution of the proceeds among his creditors. The whole administration of the property of the insolvent, devolves upon the court, through their trustee. He is authorized to to make sale of it, clear of all incumbrances; and out of the proceeds, is directed by the law, to satisfy all mortgages, judgments and liens, according to their priority. Under the 12th section, the court exercises the control over this distribution, by notice to all parties, to bring in and declare their claims, for that purpose. So that, beginning with the sale and ending in distribution, having the entire jurisdiction over the

estate of the insolvent, their judgment in all matters appertaining to it is conclusive; because they are the exclusive subjects of the special jurisdiction conferred by that act. The court is therein restricted, to the specially delegated objects to which it refers;—the case of insolvent debtors. All the subsequent changes, (and they are numerous, as regards *Baltimore* county court,) leave this jurisdiction over sales and distribution, precisely where it rested under the act of 1805. The institution of a court of commissioners of insolvent debtors, by the act of 1816, ch. 221, and the supplements to that act, were only designed to relieve the county court, under the pressure of its increasing business, from the additional labor imposed by this extensive class of cases in that court. It was but an ancillary tribunal, bound to report and return all its proceedings, and still subject, to *Baltimore* county court. And although the aid of these commissioners was required to carry the insolvent application through its several stages to a discharge, the county court still retained the whole control over the acts of the trustee.

The act of 1836, ch. 133, "For the despatch of business in *Baltimore* county court," is supposed to have produced the change on which this right of appeal is founded, by engrafting upon this special jurisdiction, equity powers; and upon the subject matter here in question, giving to the court concurrent powers with the court of chancery.

That act was only auxiliary to the act of 1835, ch. 235; the object of which was to authorize *Baltimore* county court, *ex officio,* to require from trustees of insolvents, "who shall hereafter apply for the benefit of the insolvent laws," an annual report of the funds belonging to their trust, with a view "to cause distribution to be made among the creditors." Before this act, it was the practice of some trustees, to distribute the fund at their leisure; and occasionally, to omit it altogether. With this explanation, the propriety of the provision is manifest. It defined the extent and power of that court over their trustees, to bring them annually before the court to account. Now, the 1st section of the act of 1836, extended this power to cases "pending in said court," in which the trustees of

such debtors had not yet distributed the fund; giving to such trustees, "*in cases then pending*," and *limited to such*, the right to apply "to said court, or some court of equity," for an audit and directions to distribute or invest the funds. The provision in the second section, "that the power of the court to appoint an auditor," in insolvent cases, "shall be *concurrent with that of the courts of equity*," if construed to have reference to insolvent cases in those courts, is not susceptible of any practical application; because the courts of equity, properly speaking have no jurisdiction in insolvent cases. If, however, it is interpreted to mean, that *Baltimore* county court shall have the power to appoint an auditor, in the investigation of the insolvent causes brought before them, to the same intent that courts of equity appoint an auditor, in the course of the exercise of their equity jurisdiction, the clause is then intelligible, and susceptible of practical operation. It comports with the title of the act: "To facilitate the dispatch of business in that court:" and being consistent with the reasonable intention of the legislature, such must be deemed the true construction. But when the same section further confers powers, concurrent with the courts of equity in the distribution of the funds of insolvent debtors, it assumes a power to exist, which is not within the scope of chancery jurisdiction, and confers nothing. All the power and jurisdiction in cases of insolvent debtors, had been before delegated to the county courts and orphans courts of the State; and the courts of equity have no action or control over this branch of jurisdiction. Therefore, no such power existed, to which the grant of the act of 1836 could be made to apply; and the provision is a nullity.

In addition to this, it may be remarked, that in the distribution of insolvents' estates, the county courts always proceed according to equity principles. It was the duty and practice of those courts, before the passage of the act of 1836; (1 *H. & G.*, 96, *McCulloh vs. Dashiell*,) and it is not improbable that the framers of this provision, at the time, overlooked this principle, to which all the county courts in the State, exercising jurisdiction in insolvent cases, must conform. The whole being one entire system, resting on the same principles, this enactment,

in the design apparent on its face, prescribes nothing which *Baltimore* county court was not bound to perform, and which was not attained before it was enacted.

That from a special limited jurisdiction, no appeal lies to any other tribunal, (see 8 *G. & J.*, 448, *Wilmington Rail Road vs. Condon;* and *Savage Manf. Company vs. Owings*, 3 *Gill*, 497.) And in its particular application to the insolvent courts, as courts of limited jurisdiction, (see 5 *Gill*, 89, *Williams vs. Williams*,) where the appeal of the trustee from an order of the county court, in the case of an insolvent debtor, was rejected by this court; while in the case of *Ellicott vs. Ellicott*, in 6 *G. & J.*, 35, it had previously been decided, that a trustee, *appointed by a court of chancery*, in his character as trustee, may, for the benefit of the creditors, appeal to this court against an order in chancery.

The order on which the present appeal is taken, being one from the county court, in the exercise of its special jurisdiction over the estates of insolvent debtors, from which an appeal will not lie, this appeal is therefore dismissed.

The case, however, having been fully and ably discussed, as well upon the merits as upon this preliminary motion, (and the court, not entirely unanimous in their decision upon the motion,) we proceed to state the opinion formed upon the merits, in which they all concur, and from which it will result, that the appellants have sustained no prejudice, by this summary disposition of their case, upon the motion to dismiss it.

There is no doubt in the mind of the court, that the note and the mortgage filed by the appellee as the evidence of his claim, was founded upon an usurious and unlawful loan, made by him to the insolvent; and that under our statute against usury, he would be debarred from a recovery on his contract, in any proceeding instituted by him for that purpose, either in law or in equity. "Where all usurious contracts are declared by law to be null and void, there can be no recovery, either at law or in equity, in a suit infected with usury, if the defence of usury be pleaded." *Trumbo vs. Blizzard*, 6 *G. & J.*, 23.

Thus, then, if *Dennison* is seeking to enforce his lien upon the mortgage premises in a court of chancery, the plea of usury

is a full defence to his application. He is met at the threshold, with the objection that his contract is void, and he is dismissed, even without redress, to the extent of the amount actually and *bona fide* due to him. He has made his contract with reference to the law, and is presumed to know, as one of its consequences, that no court of law or equity will lend its aid to sustain an infected contract. The door of justice is barred against his application for relief, upon an agreement made in violation of the letter and the policy of the law. Whatever moral obligation may subsist between him and his debtor, the law creates and defines the *legal* operation of his contract, and denies any interposition, at his own instance, to enforce it. He is thus doomed to a passive position, and the certain loss of his debt, unless the way to relief is opened by the debtor himself, or in some other form. This the debtor may do by his own act, and give vitality to the obligation otherwise inert and void. If he seeks relief from his creditor on the ground of usury, claiming the legal dispensation from his contract; if the circumstances compel him to address a court of equity, to relieve his property from the incumbrance of the creditor's lien; if he brings this usurious creditor, with his contract, into a court of conscience; he is at once warned, that he must do equity himself before he can ask it of others. He is required to pay or tender the actual amount of money advanced, as a preliminary to any action on the part of the court. For "there is a recognized distinction between that and the case of a mortgagor, who goes into chancery seeking relief against the mortgage on the ground of usury; which will only be extended to him on his paying, or offering to pay, the principal and legal interest of the sum due, and this upon the principle, that he who seeks equity, to obtain relief, must do equity." 6 *G. & J.*, 24, *Trumbo vs. Blizzard.*

In such a case the debtor becomes the complainant, and is properly subject to this just and universal principle of equity; while, if he waits for the action of his creditor, it is otherwise. When he becomes the actor and the originator of the proceeding, he must fail as a plaintiff, either in a court of law or equity, and he must lose his debt; because there is no *forum,*

wherein he may enforce an agreement, declared by the law to be tainted and forbidden.

Now, what is the attitude of *Dennison* here? Is he *the actor* as is contended by the appellants? Let it be remembered, that the term for which his loan was made has not yet expired; and, by the condition of his mortgage, the debt from the insolvent is not due to him until 1850. He has no claim in law or equity founded upon his contract, nor can he place himself, of his own will and motion, in the position of plaintiff against his debtor. He is called then into his present predicament by the order of the court; in other words by the act of the law. In the administration of its policy in regard to insolvent debtors, the law has superseded the action of the creditors, and invested its trustee with the control and disposal of the insolvent's property. By the action of the trustee, the property is converted into a fund, which is brought into court for distribution, according to the respective equities of the creditors. If he stands aloof and declines to come in, his debt is forever gone. He has then no alternative. His security is withdrawn from his grasp by the act of the law, and he is warned to come in upon the fund, or be forever precluded from any claim, either upon the property or upon the fund. But for this interposition of the court, he might have stood off from any participation in the proceeding. He must have remained passive from necessity, for his mortgage debt was not yet due, and he was in no condition to act. And, even if due, anticipating the consequence of any movement on his part, he would, for his own interest, have awaited the attack, which would place him on equitable grounds, and secure him his debt.

What then is his relation to the appellants, who are seeking to make him *the* actor in these proceedings? They are the alienees of the mortgagor, and stand in his place. They cannot claim to stand in a better position. *Dennison* has instituted no proceeding against them or the property. We have seen that he could not. He comes therefore into court upon the same terms and under the same authority with the appellants, and when he presents his claim, as required by the order of the court, which leaves him no option, the appellants inter-

pose the plea and exceptions by which they attack and impeach it. Surely, by every sound analogy and reason in law, they are the actors. They demand to be relieved as against him, and thus bring their case fully within the spirit, if not up to the strict letter and meaning of the rule, that requires equity first from them. "Where the plaintiff has the assistance of a court of equity, to set aside an usurious contract, it must be on the terms of paying what was really advanced, with legal interest." 2 *Brown's Ch. R.*, 640, *Scott vs. Nesbit.* See, also, *West vs. Beanes*, 3 *H. & J.*, 568.

We must bear in mind, that *Dennison's* security is the property mortgaged to him. Upon *Smith's* application for the benefit of the insolvent laws, the property is, by law, placed under the control of the trustee, and without the consent of the lien holders, converted into money. This fund brought into court is substituted for, and there represents the property. The legislature, by conferring on the trustee the whole estate and authority to sell it, never designed to divest the lien holders of their pre-existing rights, or to place them in a worse position than they sustained before his appointment. And when the trustee sells, and the money is brought into court, it is as if the property itself was there under the former existing priorities. Whatever preference the creditor had upon the property, he has upon the fund; and when a subsequent mortgagee comes in upon the fund, impeaching a preceding lien, when he proposes to make his own security available, by attacking the prior lien of another creditor, equity, *in every view of such a case*, must regard him as the complainant and actor, and before he receives equity, he is bound to concede it to others.

To consider *Dennison* the especial actor in this proceeding, by selecting him among all the creditors, would be straining the law to a point, which the circumstances will not justify. He asserts no right to the rigorous exaction of his contract. The law has undertaken to abridge its terms, by making it *solvendum in præsenti*, when its limitation was extended, by express covenant, to the year 1850. And to call him into court before the expiration of his time, and before he himself claims, or can claim, of his own motion, the strict letter of his

bond, entitles him, by every fair consideration, to the equitable abatement of the severity of the law.

This purports to be an appeal from equity. The assets of insolvents are always administered upon equitable principles. 1 *H. & G.*, 96, *McCulloh vs. Dashiel, (ante.)* And yet it is claimed by the appellants here, to enforce the utmost rigor of the law. To do so, would be to violate every principle of equity; first, to coerce his appearance in court, and then strip him of every dollar of his immatured claim: *Summum jus, summa injuria.*

To allow him the full amount of his actual advances, as the court below has done, is no novel application of chancery principles. It is a result reached upon the known pathways of equity. It is the duty and the proper province of a court of equity in a case like this, to look at all the circumstances, and if the *status* of the party before them is involuntary, and not of his own seeking, to assign him an equitable position in court, in relation to all the other parties; not to make him *the actor* in the proceeding, to his own prejudice, where he has not selected it himself, and his standing in court, will bear any other, and a more favorable construction. Upon these grounds, but for the previous disposition of the case on the preliminary motion, we should have sustained the judgment of *Baltimore* county court in the premises.

APPEAL DISMISSED WITH COSTS.

JAMES C. ACHISON *vs.* JONATHAN HUDDLESON, SUPERINTENDENT OF THE UNITED STATES ROAD WITHIN THE LIMITS OF THE STATE OF MARYLAND.—*December* 1848.

The act of Assembly passed the 10th of March 1843, imposing certain tolls upon passengers, in "any passenger or mail coach," passing over the *Cumberland* road, is no violation of the compact between the *United States* and *Maryland*, under the acts of Congress ceding to the latter that portion of said road within her limits, and the act of this State of 1831, ch. 85, and its supplements accepting the same.

A carriage whenever it is carrying the mail, must be held to be laden with the property of the *United States* within the true meaning of this compact, and consequently exempted from the payment of tolls.

But this exemption does not apply to any other property conveyed in the same vehicle, nor to any person travelling in it, unless he is in the service of the *United States*, and passing along in pursuance of orders from the proper authority.

The stipulation in behalf of the *United States*, is *limited* to the carriages laden with the property of the government, and their necessary incidents, the horses by which they are drawn, and the driver who guides them.

The tolls imposed by the act of the 10th of March 1843, are not to be regarded as imposed upon the coach, but upon the passengers.

This contract should not be expounded by the rules applicable to grants between individuals, but, in a liberal spirit, securing to the *United States* the full benefit of the exemption, and, at the same time, leaving the *State* in possession of the means to accomplish the great object of the contract, viz., the preservation of the road.

Appeal from *Allegany* county court.

An action of *assumpsit* was instituted in *Allegany* county court at April term 1846, by *James C. Achison*, the appellee, who was duly appointed the superintendent of that part of the *United States* road within the limits of the State of *Maryland*, by virtue of the act of 1831, ch. 85, passed on the 23rd of January 1832, and the several supplements thereto, to recover the sum of $716, for tolls due said superintendent for passengers travelling in the stage coaches of the defendants over said road.

The case was submitted upon an agreement of facts entered into between the parties, which, with the several acts of Assembly and of Congress therein referred to, is fully set forth in the opinion of the court. Upon this statement of facts, a *pro forma* judgment for the amount agreed upon was rendered for the plaintiff, from which the defendants appealed to this court.

The cause was argued before Dorsey, C. J., Spence, Martin and Frick, J.

By Nelson and Price for the appellant, who contended, that upon the statement of facts, there was error in the judgment of the court below; *because* the provisions of the acts of Assembly of *Maryland*, set out in said statement, and by virtue

and force of which, the plaintiff in the court below sought to support his suit, are repugnant to the provisions of the act of Congress, likewise referred to in said statement, and are therefore inoperative and void.

McKaig for the appellee, insisted, that this case is clearly distinguishable from the case of *Scaright vs. Stokes, et al.*, 3 *How.*, 151, and *Neil, Moore & Co., vs. The State of Ohio*, *same book*, 720. That the act of *Maryland*, of the 10th of March 1843, is not liable to the objections which prevailed in the cases in 3 *Howard*, referred to. That the provision of the act of 1843, on which this action is founded, is general, embracing all passengers in four horse coaches or stages, and is not, therefore, in violation of the compact between the State of *Maryland* and the *United States*, as contained in the *Maryland* act, passed January 23rd 1832.

Martin, J., delivered the opinion of this court.

The legislature of *Maryland*, on the 23rd of January 1832, passed an act, entitled "an act for the preservation and repair of that part of the *United States* road, within the limits of the State of *Maryland*."

The *first* section declares, that as soon as the assent of the government of the *United States* is obtained, as prescribed by the thirteenth section of the act, the road shall be placed under the care of the State; and provides for the appointment of a superintendent of that part of the road lying within the limits of the State; and confers upon him full power and authority to erect toll-gates thereon, at suitable distances.

The *second* section contains a specific enumeration of the vehicles, and property upon which tolls are to be imposed, and the rates at which they are to be charged; and, among other things, provides, "that for every chariot, coach, coachee, stage, wagon, phaeton, chaise, or other carriage, with two horses and four wheels," there shall be imposed a toll of twelve cents; and for either of the carriages last mentioned, with four horses, eighteen cents. And after certain domestic exemptions, which have no connection with the present case, the section terminates

with this *proviso:* "That no toll shall be received or collected for the passage of any wagon or carriage, laden with the property of the *United States*, or any cannon or military stores belonging to the *United States*, or to any of the States composing this Union."

By the *thirteenth* section it is declared: "That this act shall have no force or effect, until the Congress of the *United States* shall assent to the same; and until so much of the said road as lies within the limits of the State, be first put in a good and complete state of repair, by an appropriation made by the Congress of the *United States* to repair the same; and to pay the expense of building toll-houses and erecting toll-gates, to be built and erected by the superintendent," &c., with the provision: "That the General Assembly might, at any future session, change, alter or amend this act, so as to regulate the amount of tolls; provided, that the same should not be so altered or amended, as to reduce or increase the rates of tolls thereby established, below or above a sum necessary to defray the expenses incident to the preservation and repair of the road, for the payment of fees and compensation to the superintendent, collectors of tolls, and other agents: with the further provision, "that no change, alteration or amendment, shall ever be adopted, that will in anywise defeat or affect the true intent and meaning of this act."

The remaining sections it is unnecessary to notice, as they are mere police regulations, introduced into the act for the purpose of securing the faithful application of the tolls to the preservation and repair of the road.

An amendatory act, with respect to the preservation and repair of this road, was passed by the General Assembly of *Maryland*, on the 1st of March 1843.

By the *first* section of this act, it is declared, "that there shall be demanded and received by the toll collectors, on the road within the limits of the State, from the owner or owners of every passenger or mail coach, or stage, passing the gates on said road, the sum of four cents for every passenger carried in the same for the space of ten miles, on said road, and so in proportion for every greater or less distance; which shall be

taken and received in lieu of the tolls now established by law, on all coaches or stages with four horses, passing over said road, and which shall be collected, &c., as other tolls are collected and expended, under existing laws."

The *second* section declares, that it shall be the duty of the proprietor or proprietors, his or their agent, to furnish under oath, on the first Monday of every month, to the gate-keeper at gate No. 1, a list, showing the number of passengers transported over said road, in their respective coaches, for the month next preceding the time when the said list is to be returned.

The *third* section provides, that in the event of the said proprietors, or their agents, failing or refusing to comply with the provision of the second section of the act, it shall be the duty of the gate-keeper at gate No. 1, to demand of and receive from such proprietors so failing, the sum of one dollar for each and every stage-coach passing over said road its entire length.

And by the *fourth* section, it is made the duty of the superintendant to institute proceedings at law, either in the county courts or before a justice of the peace, against the proprietors of all or any of the stage-coaches, upon their refusal or neglect to pay all tolls imposed by this act.

An action of *assumpsit* was instituted in *Allegany* county court by the appellee, as superintendent of the road within the limits of the State of *Maryland*, to recover the sum of $716, for tolls alleged to be due to him for passengers traveling in the stage-coaches of the appellant, over the road in question.

The case was submitted to the court upon an agreed statement of facts, the material parts of which are substantially as follows:—

1. It is agreed that the stage coaches, for which the sum of one dollar each is sought to be recovered in this action, were four horse stage-coaches, used and employed by the defendants under their contract with the *United States* of the 5th of September 1839, for the transportation of the mail of the *United States*, and that the passengers, for the failure of the defendants to furnish a list of whom, under the second section of the act of the 10th of March 1843, were passengers transported in the said coaches conveying the *United States* mail.

2. That the number of coaches in which the said mails were carried, were necessary for the carriage of the said mails, and that there was no unfairness or fraud on the part of the defendants, in dividing the mails so as to use a greater number of coaches, for the carriage of the said mails, than were actually necessary for such purpose.

3. That the defendants did carry passengers in the said four horse coaches, and that the said defendants did not comply with the provision of the second section of the act of the General Assembly of *Maryland*, of the 10th of March 1843, by returning a list on the first Monday of every month, or at any other time, showing the number of passengers thus transported over the said road, in the said coaches.

It was further admitted, that the said acts of Assembly did not increase the tolls above a sum necessary to defray the expenses incident to the preservation and repair of the said road; and it was agreed, that if upon this statement of facts, the court should be of opinion that the plaintiff is entitled to recover, either upon the present declaration, or upon an amended declaration, for the four cents *per* passenger for every ten miles, the judgment is to be entered for the plaintiff for the sum of $716. But if the court should be of opinion, that the plaintiff is not entitled to recover in either case, then judgment was to be given for the defendants. A *pro forma* judgment was rendered for the appellee, upon this statement of facts, from which the present appeal has been taken.

By an act passed on the 3rd of July 1832, Congress declared its assent to the law of *Maryland*, as well as to the law of *Pennsylvania*, of the 4th of April 1831, and appropriated the sum of $150,000, for the reparation of the road east of the *Ohio* river, and for the other improvements required by the laws of those States.

On the 24th of June 1834, there was an additional appropriation by Congress, for the construction and repair of the *Cumberland* road, the *fourth* section of which declares: "That as soon as the sum, by this act appropriated, shall be expended in the repair of said road, agreeably to the provisions of this act, the same shall be surrendered to the States, respectively, through

which said road passes; and the *United States* shall not thereafter be subject to any expense for repairing said road.

As soon, therefore, as the *United States* assented to, and complied with the propositions and conditions contained in the *Maryland* law, a compact was created between the general government and the State of *Maryland*, through their respective legislatures, obligatory upon both parties, the terms and character of which is to be found in the statute of *Maryland* of the 23rd of January 1832; and the single question raised for our consideration by this record, is, whether the provisions of the act of the 10th of March 1843, are to be pronounced inoperative and void, as an infraction of this contract, between the *United States* and the State of *Maryland*.

On the 4th of April 1831, the State of *Pennsylvania* passed an act for the preservation and repair of the *Cumberland* road.

The stipulation in favor of the *United States*, was similar in terms to the *Maryland* act of the 23rd of January 1832. The law of *Maryland*, indeed, is a literal transcript of the *Pennsylvania* act, introduced to accomplish the same ends and purposes. They both declare that no toll shall be collected for any carriage laden with the property of the *United States*, or any cannon or military stores belonging to the *United States*, or to any of the States composing this Union.

On the 13th of June 1836, *Pennsylvania* passed another act, declaring: "That in all cases of wagons, carriages, stages, or other modes of conveyance, carrying passengers or goods, such wagon, stage or other mode of conveyance, shall pay half-toll upon such modes of conveyance."

This act was pronounced by the *Supreme Court*, in the case of *Searight vs. Stokes*, decided at the January term 1845, 3 *How.*, 151, to be void, upon the ground, that a carriage, whenever it is carrying the mail, must be held to be laden with the property of the *United States*, within the true meaning of the compact between the *United States* and the State of *Pennsylvania*.

But the chief justice, in delivering the opinion of the court, at page 170, says: "Unquestionably the exemption of carriages bearing the mail, is no exemption of any other property.

conveyed in the same vehicle; nor of any person traveling in it, unless he is in the service of the *United States*, and passing along in pursuance of orders from the proper authority. Upon all other persons, although traveling in the mail stage, and upon their baggage, or any other property, although conveyed in the same carriage with the mail; the State of *Pennsylvania* may lawfully collect the same toll that she charges either upon passengers, or similar property, in other vehicles." The court held, that "the compact did nothing more than exempt the carriages laden with the property of the *United States*, and the persons and baggage of those who were engaged in their service;" and that "toll might be imposed upon every thing else, in any manner passing over the road."

The act of *Ohio* of the 4th of February 1831, has a reservation in favor of the *United States*, in character similar to that of *Maryland*, but broader in its terms.

The 4th section provides: "That no toll shall be collected for the passage of any stage or coach conveying the mail of the *United States*, or horses bearing the same, or any wagon or carriage laden with the property of the *United States*, or any cavalry or other troop, arms or military stores belonging to the same, or to any of the States composing this Union, or any persons on duty in the military service of the *United States*, or of the militia of any of the States."

The legislature of *Ohio*, by the 4th section of an act passed on the 6th of February 1837, imposed a toll of "three cents on every passenger, transported in the mail-stage, at each toll-gate." By the 24th section of the act of the 19th of March 1838, the board of public works was authorised to revise and modify the rates of toll to be paid by persons using the road, and in pursuance of this power, the board, by an order, raised the toll on each passenger in the mail-stage, to ten cents: "But no toll was charged, either by the law, or the order of the board, upon persons travelling in any other carriage.

In the case of *Neil, Moore & Co., vs. the State of Ohio*, 3 *How.*, 720, the Supreme Court pronounced the toll imposed by these acts, a violation of the compact between the general government and the State, because they were levelled exclu-

sively against passengers traveling in the mail coaches of the *United States*. But the court again say, as they decided in the case of *Searight vs. Stokes*: "That they do not mean to deny the right of the State to impose a toll upon passengers in the mail stages, provided the power is exercised within the spirit and meaning of the agreement, by which the road was transferred to the care of the States. * * * * * *" The language of the court is, that "as the compact contains no stipulation for the exemption of travelers in the mail stages, the general government can demand no advantages in their behalf, which are not extended to passengers in other vehicles. But they have a right to insist, that the equality upon this subject, which *Ohio* originally promised, shall still be maintained; that the privileges and advantages intended to be secured to the carriages conveying the mail, over those granted to other vehicles, shall be preserved in substance and reality as well as in form, and that the passengers in the mail stages shall not be selected and set apart, as the especial objects upon which burdens are to be laid, and to which travelers in other carriages are not to be subjected."

That the State retains the right to enforce tolls upon passengers traveling in the mail coaches in common with travelers in other vehicles, has been directly determined by the Supreme Court, whose decisions upon the question are to be received as conclusive.

It is strange, indeed, that this question of power should ever have become a subject of contention. The stipulation in behalf of the *United States*, is limited to the carriages laden with the property of the government, and their necessary incidents, the horses by which they are drawn, and the driver who guides them. But it would be a most extraordinary expansion of the exemption to maintain that it embraces the passenger, who, in no proper sense, can be considered as an incident to the mail coach, and who is transported by the owner of the stage, for his own profit and advantage.

The provisions of the *Maryland* act of the 10th of March 1843, with respect to both, is so general in its character, embracing all passengers in four horse coaches or stages, and is

not, therefore, obnoxious to the objection, which was held to be fatal in the *Ohio cases*. And the right of the appellee to maintain this action, depends on the question, whether the tolls authorised by the act of 1843, are to be regarded as imposed upon the coach, or upon the passengers? This can scarcely be considered as an open question, after the decision of the case of *Neil, Moore & Co., vs. the State of Ohio*, in 3 *How.*, 720.

The *fifth* section of the act of *Ohio*, of the 5th of February 1837, provides, "that each and every driver of any stage, coach, or other vehicle, belonging to any such mail contractors, other than such as are allowed to carry passengers free of toll, shall at each and every gate, report the number of seats occupied in such stage, to the keeper of such gate, whose duty it shall be to open an account against the *proprietor* or *proprietors* of such stage, &c., in a book kept for that purpose, three cents for each passenger, as provided in the preceding section of this act; and said *proprietor* or *proprietors* shall pay over to such gate-keeper, at the end of every three months, the aggregate amount of tolls which shall have become due for passengers, and charged as above provided."

The *sixth* section declares, "that should the driver of any stage, &c., neglect or refuse to report to any gate-keeper the number of seats occupied in said coach, as required by the preceding section, it shall be the duty of such gate-keeper to charge the *proprietor* or *proprietors* of such stage, at the rate aforesaid, for each and every seat which might be occupied in the same, to be recovered in an action of debt." And by the *eighth* section, "the board of public works is authorised to collect tolls from any *proprietor* or *proprietors* of any line of stages, post coaches, or other vehicle for the conveyance of passengers quarterly," &c. It is perceived, that by this act, the proprietor is made responsible for the tolls laid on the passengers. And we have seen that in the case of *Neil and Moore vs. The State of Ohio*, the Supreme Court considered the tolls authorised by this act, as imposed upon the passengers carried in the mail coaches, and it was ruled to be invalid, only because it was unequal and partial in its operation.

It appears from the case of *The State of Ohio vs. Neil and Moore*, as stated by the reporter in 7 *Ohio Rep.*, 132, that the legislature by a statute of the 3d of March 1834, declared it to be the duty of every stage driver to report at each gate, to the keeper, the number of seats occupied in such stage or coach, and to pay at the rate of four cents for each seat so occupied. The court decided that this was to be considered as a tax imposed upon the passenger, and not on the coach itself, and was no invasion of the compact formed between the general government and the State of *Ohio*.

They say: "The proposition cannot be maintained, that the passengers are necessary for the conveyance of the mail, and if they are not, a tax on them is, in no light in which the subject can be viewed, a tax on the coach itself, nor calculated in its consequences to impede or obstruct the transportation of the mail."

The progress of the mail coach could not be arrested for the purpose of exacting tolls from the travelers, and the mode prescribed by the act of 1843 is the only practicable form in which a toll of this description could be imposed upon the passengers. The practical operation of the law would, perhaps, in all cases, be, to subject the passengers to an increased rate of fare.

It was contended by the counsel for the appellants, that the provisions of the *third* section of the act of 1843 show, that these tolls were laid on the coach, and not on the passengers. The court do not think so. The first section of the act makes it the duty of toll collectors, to demand from the owners of every passenger or mail coach, the sum of four cents, for every passenger carried in the same for the space of ten miles on the road; and in an action instituted against the owner of the coach, for the recovery of tolls, the list required to be furnished by the *second* section, would be evidence of the number of passengers transported on the road.

On the failure of the proprietor to furnish a list of passengers, in conformity with the requisition of this section, he is subjected to the penalty provided by the third section, at the rate of one dollar for each coach. Assuming, however, that the sum due for tolls on passengers transported on this road, at four

cents *per capita*, amounted to seven hundred and sixteen dollars, there can be no doubt that the appellee would have been entitled to recover in this action, upon an amended declaration, in pursuance of the power conferred on him by the fourth section of the act.

Even, therefore, if the argument drawn from the third section could be considered as correct, the appellants would still be responsible to the appellee, in an action of *assumpsit*, for the tolls demandable of them, under the provision of its *first* section. Assuming the construction which we have placed on the act of 1843 to be correct, there is, of course, no force in the argument, that it is to be treated as inoperative, because in conflict with the *thirteenth* section of the act of 1832. By that section, the right is expressly reserved to the General Assembly, to change, alter, or amend the act, so as to regulate the amount of tolls, subject only to the provision, so far as the present question is concerned, that no change, alteration or amendment shall ever be adopted, that will in any wise defeat or affect the true intent and meaning of this act. This provision was introduced for the purpose of guarding the compact between the *United States* and the State, against alteration or change, and, independent of this express reservation, it is clear, that the State would have retained the power to alter at pleasure. the provisions of the act of 1831, both with respect to the amount of tolls to be charged, and the objects upon which they were to be imposed, provided there was no invasion of the contract, between the general government and herself.

It has been the purpose of this opinion to show, that there has been no violation of this compact.

When speaking of the rules of construction to be applied in the exposition of a contract like this, the chief justice of the Supreme Court, in the case of *Neil, et al., vs. The State of Ohio*, 3 *How.*, 742, said: "We must look to the relation in which the parties stood to one another, as well as the subject matter of the contract, and the object which the high contracting parties intended to attain, and we must expound it upon principles of justice, so as to accomplish the purposes for which

it was made, and not defeat their manifest interpretation, by a narrow and literal interpretation of its words."

We concur in the proposition thus enunciated. The subject to which the contract referred was the reparation of a national road, connecting the Atlantic States with the valley of the *Mississippi*, constructed at vast expense, and in the preservation of which the whole country was interested; and it was entered into between sovereign States, having no adverse or conflicting interests, but so intimately associated, both politically and socially, that measures of improvement promotive of the interests of the one, necessarily advanced the prosperity of the other. A compact formed between parties, occupying towards each other this relation, should not be expounded by those rules of construction which have been applied in the interpretation of grants between individuals, or between the government and a private person. It should be expounded in a liberal spirit, unfettered by narrow and technical rules, so as to secure to the *United States* the full benefit of the exemption for which she contracted, and, at the same time, to leave the State in the possession of the means of accomplishing the great object of the contract, by raising from tolls the revenue necessary for the preservation of the road. The intention of the compact is carried out, we think, by the construction we have placed on the act of 1843.

JUDGMENT AFFIRMED.

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JOHN J. BRIESCH *vs.* THOMAS McCAULEY, WILLIAM KREPS, AND BENJAMIN PALMER AND WIFE.—*December* 1848.

A judgment at law was enjoined by an injunction founded upon the allegation of the bill, that the complainant was the holder of a single bill, which he was entitled to set off against the claim upon which the judgment was recovered. One of the defendants, in his answer, admitted the execution of this single bill, the others state that they had no knowledge of its existence. No proof was offered upon this point, and the injunction was dissolved and the bill dismissed upon [illegible].

That in this condition of the cause, it was incumbent on the complainant to sustain, by proof, the material allegations of his bill. He could not rely upon the silence of the defendants.

If the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing. Upon a motion for dissolution, they are to be taken as true.

It is an established principle of evidence, that the answer of one defendant cannot be read in evidence against his co-defendant.

Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of equity.

But a defence cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of the court that the defence ought to have been sustained at law.

The allegation that the judgment was obtained by fraud, was denied by the answer, and not established by proof. The bill contained no allegation, that the complainant was defeated at law by accident or surprise, nor does it aver that the proof he now offers upon the question there decided, came to his knowledge after the trial at law. HELD:

That under such circumstances, a court of law would have refused to grant a new trial, and there is certainly no ground for claiming the interposition of a court of equity.

APPEAL from the Equity Side of *Washington* county court.

On the 14th of May 1838, *John J. Briesch*, the appellant, filed his bill on the equity side of *Washington* county court, charging, that on the 25th of June 1827, he executed a single bill, payable to a certain *Ann Maria Kreps*, the wife of a certain *William Kreps*, for $200, loaned him by said *William Kreps*. That at the time of the execution and delivery thereof, it was understood, and so expressed by your orator and said *William*, that said single bill was payable to the said *Ann Maria Kreps*, wife of the said *William*, and with that understanding was delivered to him, and your orator then verily believed, that the christened name of the wife of said *William*, was the same as that mentioned in the said single bill. That afterwards, on the 13th of May 1833, the said *William Kreps* executed and delivered to your orator a single bill, payable in ten days, for the sum of $285.08. That your orator believed when he obtained this last bill, that it would be good and available as a set-off against the first, in case a suit should be brought thereon against your orator, in the name of the said *William Kreps*, and *Ann Maria Kreps*, his wife, during the

lifetime of the said *Ann Maria*, or by the said *William*, in the event of the decease of his said wife in his lifetime. That said *Ann Maria Kreps*, after the execution of said last mentioned single bill, transferred the first to one *William McCauley*, of *Franklin* county, in the State of *Pennsylvania*, and afterwards departed this life. That subsequent to this event, on the 23rd day of February 1836, suit was instituted in the name of *Ann Maria Kreps*, for the use of *Thomas McCauley*, against your orator, on said first mentioned single bill, upon which there was an issue, trial, verdict and judgment for the plaintiff, for $200 debt, and $117 damages and costs. That your orator pleaded in abatement of said suit, that the plaintiff mentioned in the writ, had deceased before the impetration of the same, and the issue was joined, and the verdict was on said plea, but owing to the rigid rules of the common law, he was unable to prove that said single bill was given to the said *Ann Maria Kreps*, wife of *William Kreps*.

The bill further charges, that the said *McCauley* and *William Kreps* fraudulently combined, with a view to deprive your orator of the benefit of using the last mentioned single bill as a set-off against the first, and that the verdict was founded upon the testimony of said *William Kreps*, who testified, that the first mentioned single bill was given to *Ann Maria Kreps*, the *daughter* of said *William*, and not to *Ann Maria Kreps*, *his wife*. That *McCauley* obtained possession of the same from *Ann Maria*, the wife of said *William*, and has no right thereto, except from her. That said *William* expects to receive a part of the proceeds of the said judgment; and your orator expressly charges, that the name of the said *Ann Maria*, daughter of said *William*, has been used by *McCauley* and *Kreps* fraudulently, to deprive your orator of using the last mentioned bill as a set-off to the first. That *McCauley* has issued execution on said judgment, which has been levied upon the property of your orator. The bill then prays for an injunction restraining execution of said judgment, and for general relief. The court ordered the injunction as prayed.

The *answer* of *McCauley* avers the execution by *Briesch* of a single bill, in favor of a certain *Ann Maria Kreps*, dated

25th of June 1827, for $200, payable on the 1st of April 1828, on which an action was brought and judgment obtained, as stated in the bill. Respondent has been informed and believes, and so charges, that *Briesch* executed said single bill in favor of *Ann Maria Kreps*, who was the daughter and not the wife of said *William*, and denies that the same was executed to or in favor of the wife of said *Kreps*. He denies that it was transferred to him by the wife of the said *William*, but alleges, that *Kreps* being indebted to him, transferred said single bill to him, with authority to collect the same, and, out of the proceeds, to retain a sufficient sum to pay his debt, and to hold the balance for the use of the said *Ann Maria*, and the other children of said *Kreps*. Respondent has no personal knowledge of the execution of the other single bill mentioned in the bill of complaint, alleged to have been executed by *William Kreps* to *Briesch*, in May 1833, for $285.08. Respondent expressly denies, that he and the said *William Kreps* fraudulently combined, with a view to deprive said *Briesch* of using the last mentioned single bill as a set-off to the first, as charged in the bill, or that the name of *Ann Maria Kreps*, the daughter, was fraudulently used by them, with a view to deprive the complainant of so using said last mentioned single bill, and denies all manner of unlawful combination charged against him in the bill. The answer also sets forth, by way of *plea*, that the complainant had the same means of defence in the suit at law which he now rests his case on in this court, and that he suffered a recovery against him, by neglecting to use them, and that the verdict and judgment are not impeached in the bill, by facts or on grounds, of which the complainant could not have availed himself in the trial at law, nor was he prevented from so doing, by fraud or accident, or the acts of the opposite party, and that he does not seek any relief which the court of law, in which the judgment was recovered, was not fully adequate to render.

The *answer of William Kreps* avers, that *Briesch* executed to *Ann Maria Kreps*, the daughter of respondent, the first mentioned single bill, at the time and for the sum stated in the bill of complaint, and expressly denies that it was executed in

favor of his wife, or that his wife was named *Ann Maria Kreps*, but that it was made in favor of his daughter, and so understood by respondent and *Briesch* at the time the same was executed. Respondent admits that he did, in May 1833, execute in favor of said *Briesch* a single bill, for the sum of $285.08, as set forth in the complaint. Respondent's wife died in 1835. He denies that his wife ever transferred said single bill to *McCauley* as charged, but that respondent, with the assent of his said daughter, whom he had maintained and educated, and who was indebted to him therefor, transferred the same to *McCauley*, in satisfaction of a debt due him by respondent, with the understanding that he should collect the amount due, and, after retaining sufficient to pay his claim, to hold the balance of the proceeds for the use of the said *Ann Maria*, or such other person as might be entitled to the same. Respondent admits, that he testified in the suit at law, that his wife was not named *Ann Maria Kreps*, but *Polly Kreps;* and that said single bill was not given to his wife, but in the name and for the use of his daughter, *Ann Maria Kreps*. In other respects, this answer contains the same denial of fraud and fraudulent combination, and relies upon the same defences, as the answer of *McCauley*.

The *answer of Benjamin Palmer*, and *Ann Maria*, his wife, (formerly *Ann Maria Kreps*,) alleges, that *Briesch* did execute the single bill in question in favor of the respondent, *Ann Maria*, for the sum and at the time stated in the bill of complaint. That respondent was a minor at that time, and is the daughter of *William Kreps*, was supported and maintained by him from infancy until her mother's death, in 1835. That her father obtained said note from *Briesch*, and had it drawn payable to *respondent*, and not to her mother, the wife of said *William Kreps*. That the name of her said mother at the time said note was executed, was *Polly Kreps*. The answer then states the transfer of the note to *McCauley*, with assent of respondent, as stated in *Kreps' answer*. Respondent has no knowledge of the note of $285.08, alleged in the bill to have been executed by said *William Kreps* to said *Briesch*, in *May* 1833. In other particulars this answer is similar, so far

as the knowledge of respondent extends, to those of *Kreps* and *McCauley*, and relies upon the same defences as are therein contained.

A commission was then issued to take testimony, under which a mass of evidence was taken, which it is unnecessary to state, the effect thereof being sufficiently stated in the opinion of the court.

The cause being then submitted, the court below passed the following decree:

"The above cause being submitted to the court on final hearing, and the bill, answers and evidence in the cause having been by the court read and considered, it is thereupon, this 1st day of April 1847, by the court, ordered, adjudged and decreed, that the injunction heretofore granted in said cause, be, and the same is hereby dissolved, and that the bill of complaint in this cause be, and the same is hereby dismissed with costs."

From this decree the complainant appealed to this court.

The cause was argued before Spence, Martin and Frick, J.

By Price and Tidball for the appellant, and
By Roman for the appellee.

Martin, J., delivered the opinion of this court.

There are to be found in the bill filed in this case, three allegations, which, if true, would have entitled the complainant to the protection of a court of equity. They are—

1. That the single bill of the 27th of July 1827, was executed by the complainant in favor of the wife of *William Kreps*, and that upon her death it devolved upon her husband.

2. That the complainant was the holder of the single bill of the 13th of May 1833, drawn in his favor by the said *William Kreps*, and which he had, therefore, the right to set off against the first mentioned note. And—

3. That the institution of the action in the name of the daughter of *William Kreps*, and the judgment consequent thereon, was the result of a fraudulent contrivance concocted between *Thomas McCauley*, to whom the single bill of the

27th of July, had been assigned, and *Kreps*, for the purpose of preventing the complainant from using one note as a defence against the other.

These facts, collectively considered, certainly presented a strong case for the application of the conservative powers of a chancery court, and they were, no doubt, the allegations by which the learned judge was influenced in granting the injunction.

But the aspect of the case is entirely changed by the answers, which are exhibited in this record.

It will be seen that the defendants positively and distinctly deny the allegation of combination and fraud. There is an entire absence of any evidence, calculated to overcome these responsible averments in the answers with respect to the charge of fraud; and it is manifest, that the injunction must have been dissolved upon this negation of the imputed fraud.

But there is another objection to the relief sought by the complainant, that cannot be overcome.

An examination of the bill will show, that the claim of the complainant to the interposition of the court, stands upon the allegation, that he was the holder and proprietor of a single bill of the 13th of May 1833, executed in his favor by *William Kreps*, which, in law, he was authorized to set off against the note upon which the suit in controversy was instituted. This fact lies at the foundation of his case; and the counsel for the appellee has contended, that this allegation has not been proved, and that the cause is to be treated, as if this single bill had no existence.

Has this averment been proved? We think not.

The existence of this single bill is not admitted by the answers of *Thomas McCauley*, or of *Anne Maria Palmer*.

*McCauley* in his answer says:—"He has no personal knowledge of the execution of the other single bill mentioned in the complainant's bill of complaint, and alleged to have been executed by the said *William Kreps*, to the said complainant, for the sum of $285.08."

The answer of *Ann Maria Kreps* is to the same effect.

In this case the injunction was dissolved, and the bill dismissed on *final hearing;* the bill, answers and evidence being before the court. In this condition of the cause, it was incumbent on the complainant to sustain, by proof, the material allegations of his bill. He could not rely upon the silence of the defendants. This is the doctrine of *Warfield vs. Gambrill*, 1 *G. & J.*, 503. In *Young vs. Grundy*, 6 *Cranch*, 51, it was held:

"That, if the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing; upon a question of dissolution of an injunction, they are to be taken as true."

How then is the existence of the single bill in question attempted to be established?

Only by the answer of *William Kreps*, who admits the execution of the note, as stated in the bill. But it is an established principle of evidence, that the answer of one defendant cannot be received in evidence against his co-defendant. If the complainant desires to prove a fact, by the evidence of a co-defendant, he may examine him as a witness on interrogatories, and thus afford his adversary an opportunity to cross-examine him. *Stewart vs. Stone*, 3 *G. & J.*, 510.

Upon this ground, therefore, the court below could not do otherwise than dismiss the bill.

The appellant has failed, in other respects, to present a proper case for the interposition of a court of equity.

The question, as to whom the single bill of the 27th July 1827, was given, was tried at law, upon a plea in abatement interposed by the complainant. The jury found the plea to be false, and a final judgment was rendered for the plaintiff, as the legal consequence of the verdict.

We have seen that the allegation, that this judgment was obtained by fraud, was negatived by the answers, and has not been established by testimony. It is neither alleged nor proved, that the appellant was defeated in the trial at law, by accident or surprise, of which he was not aware, and against which he could not, by skill and diligence, have protected himself. A large mass of testimony is exhibited in the record, on the point

that was involved in the controversy at law, but it is cumulative in its character, and it is not even averred, that it had reached the knowledge of the complainant since the trial. Under such circumstances, a court of law would have refused to grant a new trial. There certainly is no ground for claiming the interposition of the chancery tribunal.

In the case of the *Marine Insurance Company vs. Hodgson*, 7 *Cranch*, 336, the Supreme Court declared:

"Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may be safely said, that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself, or his agents, will justify an application to a court of equity. On the other hand it may with equal safety be laid down as a general rule, that a defence cannot be set up in equity, which has been fully and fairly tried at law, although it may be the opinion of the court, that the defence ought to have been sustained at law." The same principle is recognised and announced in *Barker vs. Elkins*, 1 *Johns. Ch. Rep.*, 466; *Gott vs. Carr*, 6 *G. & J.*, 309; and *Dilly vs. Barnard*, 8 *G. & J.*, 170.

For these reasons, we think, the decree of the county court must be affirmed, but express no opinion on the question of fact raised by the record.

DECREE AFFIRMED.

PHINEAS JANNEY *vs.* WILLIAM O. SPRIGG, ADMINISTRATOR D. B. N., C. T. A. OF SARAH LAMAR.—*December* 1848.

A testatrix devised and bequeathed all her real and personal estate to her niece, *M T.* The will then proceeds: "should my said niece die leaving children, all the real and personal estate, hereinbefore devised and bequeathed to her, shall vest in such child or children absolutely and in fee

simple, provided such child or children should attain the age of twenty-one years, or previously marry, but should my said niece die *unmarried and without leaving children*, and should she die leaving children, and such child or children die before the age of twenty-one years, *or* without having married previous to the attainment of such age," then over to her other nephews and nieces. HELD:

That to effectuate the general intent of the testatrix, the word "*and*," between the word "unmarried," and the words "without leaving children," must be construed "*or*," and the word "*or*," between "years," and "without," must be construed "*and*."

This conversion of "*and*" into "*or*," and of "*or*" into "*and*," will be made to effectuate the clear intent as apparent upon the whole will, either for the benefit of the first devisee and his issue, or for the benefit of the ulterior devisee.

The clear intention of this testatrix was, that her estate devised, should first vest in her niece, *M T*, and in the event of her leaving a child or children, it should vest in such child or children in fee simple, provided they attained the age of twenty-one years or previously married; and in the event of *M T's* death without children, the estate should pass under the limitation, over to her other nephews and nieces.

The estate being limited over, after the death of the niece, to her children in fee, and then contingently over to the ultimate devisees, so that the children taking no part of the realty, by inheritance, from their mother, but holding under the will as purchasers, *per formam doni*, the husband of the niece could, upon no possible contingency, become a tenant by the curtesy thereof.

APPEAL from *Allegany* county court.

On the 16th of June 1846, the appellee, as administrator *d. b. n., c. t. a.* of *Sarah Lamar*, deceased, instituted an action of *replevin* in *Allegany* county court, against the appellant, to recover a certain negro slave, named *Ellen*, and her two children, described in the writ. The defendant pleaded property in himself. At the trial, the plaintiff to support the issue on his part, offered in evidence the last will and testament of *Sarah Lamar*, deceased, executed on the 18th of March 1839, and admitted to probate on the 23rd of October 1839; whereby, after payment of debts and funeral charges, she devises and bequeaths as follows: "I give and bequeath unto my kind and faithful domestic and friend, *Ruth Barker*, the annual sum of $30, during her life. It is my wish, if my executor should approve of it, that in order to raise this annuity, the sum of $500 be loaned out upon good security, or invested in good

bank stock, and that the interest or dividend thereon be appropriated to the said *Ruth*, in such a manner that she may draw the same in her own name; and at the death of the said *Ruth*, said principal sum is to be subject to the dispositions hereinafter made of my estate; but should this arrangement not be made, she is to be paid the said sum of $30 by my executor, in the month of April every year."

"*Item.*—It is my will and desire, that if my executor should think it most advisable, he may sell and dispose of my negro woman, *Ellen*, and her children, the said negro woman is to have the privilege of choosing her own master. It is my wish, that the mother and children may not be parted, but should my niece, *Mary Tilghman*, wish to retain, for her own use, one or more of said *Ellen's* children, she is to have the privilege of doing so. The money arising from the sale of said negro woman and children, is to be disposed of as hereinafter provided."

"*Item.*—It is also my will and desire, that all the household goods and furniture which I may leave at my death, be sold by my executor, excepting such articles as my said niece, *Mary*, may wish to retain for her own use, and the proceeds be also disposed of as hereinafter provided."

"*Item.*—I give, devise and bequeath unto my beloved niece, *Mary Tilghman*, all my real estate, wherever the same may lie or be situated, and also all my personal estate, of every description. It is my will, that the money which I may leave at my death, (subject to the provision above made in favor of *Ruth Barker*,) together with such addition thereto as may be made by the sales above directed, and from other sources, shall be loaned out at legal interest, upon good security, or invested in good bank or other stocks by my executor, and that the interest or dividends annually accruing thereon, be paid over to my said niece, for her sole use and benefit. Should my said niece marry, and die leaving children, it is my will and desire, that all the real and personal estate hereinbefore devised and bequeathed to her, shall vest in such child or children, absolutely and in fee simple, provided such child or children should attain the age of twenty-one years or previously marry.

But should my said niece die unmarried and without leaving children, or should she die leaving children, and such child or children die before the age of twenty-one years, or without having married previous to the attainment of such age, then I further devise and bequeath all said real and personal estate as follows: First, I give and bequeath unto my favorite nephew, *William O. Sprigg*, the sum of $1000. The residue of my personal estate, if any, and my real estate, are then to be divided equally, share and share alike, amongst the children then living of my sister, *Mary Sprigg*, my brother, *William Lamar*, and *Margaret*, daughter of my sister, *Louisa Tilghman*, should she be alive. With a view to this division, my real estate is to be sold by a trustee, to be appointed by *Allegany* county court, and the proceeds of sale, together with the residue of the personal estate, if any, are to be distributed, under the supervision of said court, amongst those entitled to receive the same, as provided above; and lastly, I do hereby constitute and appoint *Michael C. Sprigg* to be sole executor of this my last will and testament, hereby revoking," &c. It was then admitted, that the three negro slaves claimed in this suit, are the same mentioned in said will. That *Mary Tilghman*, named in said will, was an infant orphan at the time it was made; that afterwards, on the 10th of December 1844, she intermarried with the defendant, and in November 1845, died, leaving the defendant, her surviving husband. That she died without leaving children, and never had a child. That *Michael C. Sprigg*, named as the executor of said will, duly qualified as such, and was also duly appointed guardian to the said *Mary Tilghman*.

The defendant then offered in evidence the administration account book of said county, which showed, that *Michael C. Sprigg* made a final settlement of his executorship, under said will, on the 9th of November 1841; also the guardian account book, showing that *Michael C. Sprigg*, as guardian of *Mary Tilghman*, accounted for the hire of said three negroes, as guardian of said *Mary*. The defendant then proved, that the said *Michael C. Sprigg* delivered the said three negroes to defendant, soon after his intermarriage with said *Mary*, and

that he retained the same until this *replevin* issued. Whereupon the defendant prayed the following instruction to the jury:

That upon the evidence offered, and by the will of *Sarah Lamar*, *Mary Tilghman* took the absolute title in the property bequeathed to her, and that the same did not pass over, by the construction of the will, to *William O. Sprigg* and others, and that on the death of the said *Mary Tilghman* without leaving children, the right to the property become vested in *Phineas Janney*, the defendant, which instruction the court refused to give, and the defendant excepted, and the verdict and judgment being for the plaintiff, the defendant appealed to this court.

The cause was argued before Dorsey, C. J., Spence and Frick, J.

By T. Perry and Price for the appellant, and
By McKaig and Roman for the appellee.

Dorsey, C. J., delivered the opinion of this court.

There is but one question for our determination in this case, and that arises on the construction of the last will and testament of *Sarah Lamar*.

By which, after giving an annuity of thirty dollars a year to another person for life, the testatrix devises and bequeaths to her beloved niece, *Mary Tilghman*, all her real and personal estate of every description; and after directing her executor to convert all her personal estate into money, and to lend out the same at interest on good security, or invest it in good bank or other stocks, she directed the interest or dividends annually accruing thereon, to be paid over to her said niece for her sole use and benefit. The will then proceeds as follows: "Should my said niece, *Mary*, die, leaving children, it is my will and desire, that all the real and personal estate hereinbefore devised and bequeathed to her, shall vest in such child or children, absolutely and in fee-simple: provided such child or children should attain the age of twenty-one years, or previously marry; but should my said niece die unmarried and without leaving

children, or should she die leaving children, and such child or children die before the age of twenty-one years, or without having married previous to the attainment of such age, then I further devise all said real and personal estate as follows:—*First*, I give and bequeath unto my favorite nephew, *William O. Sprigg*," &c., and others, her nephews and nieces, absolutely or in fee. *Mary Tilghman* intermarried with the appellant and died, never having had a child or children. The only question argued before this court, and on which its opinion was required, was, whether the word "and," between the word "unmarried," and the words, "without leaving children," was to be construed disjunctively, as if it had been "or." It was conceded in the argument, that the word, "unmarried," meant never having been married, and that children, meant the offspring of lawful wedlock.

In 2 *Wms. on Ex'rs*, 715, the author in giving the general rules for the construction of wills, states, as his 5th rule, "that the will must be most favorably and benignly expounded, to pursue, if possible, the intention of the testator. To effectuate, therefore, the clear intention as apparent upon the whole will, words and limitations may be transposed, supplied or rejected. But the rule is, that words in a will are not to be rejected, unless there cannot be any rational construction of the words as they stand. So, in order to advance the apparent intention of the testator, 'or' may be construed, 'and,' and *vice versa*, in cases of legacies as well as devises of real estate. So 'if,' may be construed, 'when,' for the same purpose." For all which numerous authorities are cited; but for the establishment of principles so familiar, it is deemed unnecessary to refer to them.

In 6 *Johns.*, 54, *Jackson vs. Blansham*, one of the authorities relied on by the appellant, where "or" was construed to mean "and," by *Kent*, *Chief Justice;* who after a full examination of all the authorities upon the subject, "quoted with approbation the rule, that in deeds and wills, the words, 'or' and 'and,' are not to be always held to a strict grammatical sense, but 'or,' is to be taken for 'and,' and 'and' is to be taken for 'or,' as may best comport with the intent and meaning of the grant or devise."

Numerous decisions have been adduced to show, that where a testator has devised property in fee with a limitation over, in case of the death of the first devisee, "under twenty-one or without issue," or of his dying "under twenty-one, unmarried or without issue," the word "or" is to be interpreted as if it were "and." The principle thus asserted, is now so well established, that it is unnecessary to enumerate the cases on which it depends, or in that respect to make any comment upon them. The conversion of "or" into "and," or of "and" into "or," say the appellant's counsel, is never to be made, in the construction of last wills and testaments, unless it be for the benefit of the first devisee or his issue, it is not to be allowed in any case for the benefit of the ulterior devisee. For this broadly asserted proposition, so materially qualifying or changing the general rule, heretofore so universally recognized upon the subject, no decision of any court, or even *dictum* of a judge, has been produced.

In *Hepworth vs. Taylor*, 1 *Cox*, 112, a "bequest over, in case the legatee died unmarried, *and* without issue, was held to take effect on the death of one married, but without leaving issue." This decision could have been made upon no other principle than by construing "and," as if it had been "or." As had "and" been construed copulatively, nothing but the first legatee's death, without ever having been married, could have given effect to the limitation over.

*Wilson vs. Bayley*, 3 *Brown, C. R., (Tomlins' edition,)* 454, the word "and" was interpreted as "or," to give effect to the limitations over.

The case of *Haberly vs. Strode*, 3 *Ves.*, 450, is, for the most part, in the very words of the case now before this court. The limitation over, after an absolute estate to the son, of all the testator's real and personal estate, (which was to be sold and invested in government and real securities,) was as follows: "but in case my said son shall die *unmarried and without issue*, or having issue, they shall all die before he, she, or they, if a son or sons, shall attain the age of twenty-one years, respectively, or if a daughter or daughters, shall attain the age of twenty-one years, or be married, respectively," then over to the ulterior legatees.

In this case *Lord Alvanly* decided, that "and" should mean "or," between the word "unmarried" and the words "without issue."

*Ball vs. Phyn*, 7 *Ves.*, 453, is also a very strong authority for interpreting the word "and" as "or," in the will now before us. The limitation there, was, in case of the death of the first devisee, "without being married, and having children," then over. *Sir William Grant*, the master of the rolls, by whom the case was decided, says, "indeed the contingency of dying unmarried and without children, cannot properly be said to mean any thing more than the latter event, as legally speaking, there can be no children without a marriage. And therefore, to give effect to all the words, it is necessary to construe the copulative as disjunctive." The result of the decisions in the three preceding cases was to give effect to the limitations over.

But, say the counsel for the appellant, the cases of *Maberly vs. Strode*, and *Bell vs. Phyn*, are no longer regarded as of any authority, and to prove this, they, in the first place, have referred to 2 *Wms. on Ex'rs*, 715, *note (i.,)* where, after the author of that valuable work had stated the decisions in these two cases, without questioning their correctness or authority, the annotator to that work, by the note referred to says, "*Maberly vs. Strode*, 3 *Ves.*, 450 ; *Bell vs. Phyn*, 7 *Ves.*, 459. This construction was refused in *Doe vs. Cooke*, 7 *East.*, 269; *Doe vs. Rawlings*, 2 *Barn. & Ald.*, 441 ; *Girdlestone vs. Doe*, 2 *Sim.*, 225.

This note, the appellant's counsel rely on, as shewing that these two cases, the one in the 3*d*, and the other in 7*th Ves.*, have been overruled, or are inconsistent with the subsequent authorities referred to in the note. After examining these authorities, it is hardly fair to adopt the appellant's construction of this note, and yet it is difficult to discover what other interpretation could well be given to it. The first of the annotator's three cases, read to us, in which he tells us the court refused to change "and" into "or," contrary to the decisions of *Maberly vs. Strode*, and *Bell vs Phyn*, is that of *Doe vs. Rawlings*, 2 *Barn. & Ald.*, 441, where the devise was to the daughter in

fee, with a limitation over, if she "shall die under the age of twenty-one years, unmarried and without lawful issue." The court did in this case refuse to interpret the word "and" between "unmarried," and the words "without lawful issue," as "or;" but why? because by such a construction, had the daughter died under the age of twenty-one years, leaving issue, such issue could have taken nothing under the devise to the daughter, and the whole estate would have passed under the limitation over, contrary to the clear intent of the testator, and in opposition to all the adjudications upon the subject, as well in *Maryland* as elsewhere. Nay, so far from the court's changing "and" into "or," had the word "or" instead of "and" been that which was contained in the devise, the court would, without a moments hesitation, at the present day, have declared that it must be construed conjunctively, that it meant "and."

The second case read to us, referred to in the note in *Wms. on Ex'rs*, is that of *Doe vs. Cooke*, 7 *East.*, 269, and all that has been said in reference to the question now under consideration, of the case in 2 *Barn. & Ald.*, applies with equal force to the case in 7 *East.*

The third case referred to by the annotator, is that of *Girdlestone vs. Doe*, 2 *Simons*, 225, where it is impliedly asserted in the note, that the court refused to construe the word "and" as if it had been "or." No such question arose in that case, no such refusal was made by the court. The effort there was to interpret "or" as meaning "and," which was not sustained by the court; the vice chancellor stating: "It appears to me, that 'or' must be construed disjunctively here, as the context required it."

The note cited from 2 *Wms. on Ex'rs*, can, for the reasons stated, give no aid to the appellant's assertion, that the cases of *Maberly vs. Strode*, and *Bell vs. Phyn*, are no longer regarded as of any authority. But this assertion was urged by the appellants as fully sustained by the opinions of *Lord Brougham*, in the case of *Dillon vs. Harris*, 1 *Bligh, N. S.*, 329, so far from *Lord Brougham* designing to overrule the case of *Maberly vs. Strode*, if we are to collect his meaning

from what he has said, he clearly acknowledged the authority of that case, and argued upon its facts, to prove the correctness of its decision. In pages 359 & 360 of 4 *Bligh*, he says: "Much stress has been laid upon the authorities of *Maberly vs. Strode*, and *Bell vs. Phyn*. But in *Maberly vs. Strode*, there was a third clause, which almost imposed on the court a necessity of changing the word, to give a reasonable construction. The limitation over, was, in case the son of the testator should die unmarried, and without, or having issue, they should all die before attaining the age of twenty-one years, or marriage. It was to accomplish the general intent of the testator, which was apparent in this case from the superadded provision of the will, that the word 'and' was construed disjunctively. As to *Bell vs. Phyn*, *Sir W. Gant*, referring to the case of *Maberly vs. Strode*, does not take notice of the circumstances to which I have adverted, of the superadded clause in that case, and he held that the word 'and' must be construed 'or,' probably upon the ground, that the case, upon the general intention of the testator, to be collected from the provisions of the will, required such change to give a reasonable construction. But the doctrine is not to be applied to a case, where the intent of the testator would be frustrated, not advanced, by such a charge."

And in his lordship's subsequent remarks on the final decision of the appeal in the House of Lords, in commenting on the case of *Maberly vs. Strode*, as affecting the case then under consideration, he clearly shows, that it was not his intention to deny its authority, but its application, to the case which he was then deciding, In page 365 of 4 *Bligh*, he states: "It is said that in this case, the word "and" should be construed 'or;' and that is contended on the authority of two cases, *Maberly vs. Strode*, and *Bell vs. Phyn*, the one determined by *Lord Alvanly*, and the other by *Sir William Gant*, and which are connected together, inasmuch as in *Bell vs. Phyn*, a reference was made to *Maberly vs. Strode*. Reliance being placed upon those two cases, when you come to look into them, they do not bear out the proposition of reading 'and' in the disjunctive, as 'or,' where it will tend to frustrate and not to

further the general intent, which would be the effect here. In that case, there was a third clause in the devise, which showed that the testator contemplated the having issue, and the decease of that issue under age."

From these extracts from the opinion of the lord chancellor, who delivered the opinion adopted by the House of Lords, in *Dillon vs. Harris*, 4 *Bligh*, 321, it is manifest, that in the decision there made, there was no design to overrule or impair the authority of *Maberly vs. Strode*, on the contrary, its authority was fully recognized. If such recognition be sustained by this court, the correctness of the county court's decision in the case before us, admits of no question.

It is believed, on an attentive perusal of the will of *Sarah Lamar*, every sound, unprejudiced and discriminating mind will be led to the conclusion, that it was the intention of the testratrix, that her estate devised should first vest in her niece, *Mary Tilghman*, and in the event of her leaving a child or children, that her estate should vest in such child or children in fee-simple, provided they attained the age of twenty-one years, or previously married; and that in the event of *Mary Tilghman's* death, without leaving any such child or children, that the estate should pass under the limitation over to her nephews and nieces, as provided for by the will. That such was the general intent of the testatrix, appears upon the face of the will. *Mary Tilghman* and her children were the first objects of the testatrix's bounty, and for whom she especially designed to make provision by her will. The secondary objects of her bounty were her nephews and nieces, to whom she limited over her estate in the event of *Mary Tilghman's* death, without leaving children, who might arrive to the age of twenty-one years, or previously marry. Upon failure of the primary objects of her bounty, she intended her estate should pass to those, who, by the terms of her will, she had shewn to be the secondary objects of her bounty.

For those classes, only, did she evince by her will, any disposition to make a provision. That any portion of her estate in the event of *Mary Tilghman's* marriage, should vest in her husband, it is manifest, was contrary to the intention of the

testatrix, who appears sedulously to have endeavoured to guard against it.

Her personal estate, that it might, undiminished, reach the hands of the ulterior objects of her bounty, she directs the executor to lend out at interest, or invest in stocks, and that "the interest or dividends annually accruing thereon, be paid over to my said niece for her sole use and benefit." Thus evincing a manifest design, that not even the income of the personal estate given to her niece, should be permitted to pass into the hands of her husband. And the testatrix has with equal success, and from design, it must be presumed, so disposed of her real estate, that the husband of her niece should, upon no possible contingency, become, thereof, a tenant by the courtesy. She has limited the estate over after the death of the niece to her children in fee, and then contingently over to the ultimate devisees, so that the children taking no part of the realty by inheritance from their mother, but holding under the will as purchasers *per formam doni*, the husband could possess no title as tenant by the courtesy. But what is the right now asserted by the husband, the appellant, as resulting from the true intention of the testatrix, to be collected from the face of the will? It is, that by his marriage with the niece, and her death without children, that all the limitations over in the will are defeated, and that the entire personalty bequeathed, becomes his property absolutely, and that the real estate devised, descends to the right heirs of his deceased wife. Judging from the face of the will, is it possible to believe that such was the intention of the testatrix? Can it be supposed, as is the unequivocal result of the language of the will, as interpreted by the appellant, that if *Mary Tilghman* had died, leaving a husband and children, who departed this life under the age of twenty-one and unmarried, it was the intention of the testatrix, that her whole real and personal property should become the absolute estate of the ultimate devisees, the nephews and nieces mentioned in the will; but that if the wife had thus died without children, the limitation over to the nephews and nieces was wholly inoperative and void, and the personalty became the property of the surviving husband, and

the realty descended to the right heirs of the deceased wife. For such an intention in the testatrix, the most prolific imagination would be at fault in conjuring up the semblance of a reason. Are we by the words of the will driven to the adoption of the appellant's interpretation of it? Certainly not. By construing the "and" between the word "unmarried," and those of "without leaving children," as "or," every pretence for asserting the present claim of the appellant is swept from under him. And independently of the reasons hereinbefore stated, to prove, that it never could have been the design of the testatrix, that the word "and," referred to, should be construed copulatively, we think its disjunctive signification is sufficiently demonstrated by its connection with the word "unmarried," as it appears in this will. In contemplation of law, is it not an absurdity to say, when unconnected with any other contingent event, that if a female "die unmarried and without leaving children," then property devised to her shall pass to another? How can there be children left, if the devisee never marries? The addition in such a case to the word "unmarried," and, "without leaving children," is a legal absurdity, and to give to such a clause in a will a rational interpretation, and a meaning to every word used in it, "and" should be construed disjunctively. But it is said, that by so doing, you silence the word "unmarried," and deprive it of all meaning and operation. In our opinion no such consequence would result from reading "and" as "or." The meaning and operation of the word "unmarried," would remain unchanged, and the effect of its introduction in that clause of the will would be, that if the niece died unmarried, the limitation over would take effect; and construing "and," disjunctively, if she died without leaving children, the same result would follow; or in the next succeeding provision in the will, should she die leaving children, and such child or children die before the age of twenty-one years, or without having married previous to the attainment of such age, "then the nephews and nieces were to take the estate devised to them." By this, and by no other legitimate construction, is consistency produced in the different expressions in the will, and the general intent of the testatrix,

in the disposition of her estate, effectuated. If, in the construction of such a will, as that now before us, authorities are deemed necessary, they can be found in *Hepworth vs. Taylor*, 1 *Cox. Rep.* 112; *Maberly vs. Strode*, 3 *Ves.*, 450, and *Bell vs. Phyn*, 7 *Ves.*, 453.

But the changing of the word "and" into "or," is not the only transmutation that is to be made in the contingencies, upon which the limitation over is made to depend, to secure the full effectuation of the general intent of the testatrix, as to the disposition of her estate. The last contingency on which the limitation over is dependant, as expressed in the will, is, "should she die leaving children, and such child or children die before the age of twenty-one years, or without having married previous to the attainment of such age." If the word "or," between "years" and "without," &c., is to be construed disjunctively in its grammatical sense, the necessary consequence would be, that the limitation over would take effect if the child or children died under the age of twenty-one years, although such child or children may have married, and died under the age of twenty-one years and leaving issue; and the limitation over would, in like manner, have been effectual, if the child or children had died without having married previous to the attainment of such age, although such child or children may have lived fifty years after attaining their majority, and died leaving a numerous progeny. That such was not the intention of the testatrix, is demonstrable from the will itself, and from almost numberless decisions. How then is this incongruity, this glaring violation of the intent of the testatrix, to be prevented? By doing what has been done in numerous cases in this State, and elsewhere, construe the word "or," in the place referred to, copulatively, as if it were "and."

The will before us furnishes a strong illustration of the wisdom, justice and propriety, of the rules for the construction of last wills and testaments, inserted in this opinion, as extracts from 2 *Wms. on Ex'rs*, and the opinion of *C. J. Kent* in 6 *Johns. Rep.* The judgment of the county court is affirmed.

JUDGMENT AFFIRMED.

## William Patterson *vs.* John Crookshanks.—*Dec.* 1848.

The act of 1833, ch. 224, authorising the county courts to extend the term of service of slaves for a term of years, in certain cases, and its supplement, the act of 1845, ch. 105, conferring the same power upon the several orphans courts of the State, give no jurisdiction, either to the county courts or the orphans courts, unless the master, mistress, or agent, resides in the county where the application is made.

The object of these acts, which are to be construed together, was to give to each of these courts concurrent jurisdiction over the subject matter, when the parties claiming, or their agents, reside within the limits of the county. Any other construction would conflict with the whole judicial system of the State.

The appellee applied to the orphans court of *Washington* county, under the act of 1845, to extend the term of service of the appellant, who, he alleged, was sold to him as a slave for a term of years, to expire on the 1st of January 1844, and, in support of his title, offered a bill of sale for such term, manumitting the appellant thereafter, which was not recorded. Held:

That the appellee having treated the appellant as a freeman in the court below, he could not, upon an appeal to this court, turn round and impeach the instrument of his own title, on the ground of its defective execution and want of record, and thereby make the appellant a slave, in order to deprive him of a legal standing in the appellate court.

Appeal from the Orphans court of *Washington* county.

On the 24th of October 1848, the appellee filed a petition in the Orphans court of *Washington* county, stating, that in 1832, a certain *Joseph R. Ford*, of *Baltimore* county, sold to petitioner a servant, named *William*, for a term of years, to commence on the day of sale, and end on the 1st day of January 1841. That petitioner had said *William* in his possession until the 12th of September 1838, when he absconded, and has been gone since, whereby he has lost his services for the time intervening between the said 12th of September and the 1st of January, 1841. That said *William* was recently arrested as an absconding servant, and he now brings him into court to be dealt with according to law. That he is advised, your honors can extend the term of said *William*, so as to indemnify your petitioner for said loss of service.

The defendant, *William Patterson*, by his answer, denied the matters charged in the petition, and prayed the court to examine into the said charges, and that he might be dismissed with costs, &c.

In support of the petition, a bill of sale from *Joseph R. Ford*, of *Baltimore* county, conveying to *John Crookshanks*, of *Baltimore* county, for the sum of $200, a negro boy named *William*, aged about eighteen years, to serve until the 1st of January 1844, which also contains this covenant, "and the said *John Crookshanks*, for himself, his executors," &c., does hereby covenant, &c., to and with the said *Joseph R. Ford*, that from and after the said 1st of January 1844, the said negro boy *William* shall be liberated, manumitted and set free, and forever discharged from any and all kinds of slavery whatsoever. This bill of sale was dated 10th of February 1832, signed and sealed by said *Ford* and *Crookshanks*, and acknowledged before *Matthew Murray*, a justice of the peace for *Baltimore* city, but was not recorded. There is also exhibited a power of attorney from "*John Crookshanks*, of *Baltimore* city," "authorising his son, '*William F. Crookshanks*, of *said city*,' to file said application, and to sell said *William* for such term as the said Orphans court should direct," &c. This power of attorney was also acknowledged before a justice of the peace for *said city*.

Testimony was then taken establishing the identity of the boy, *William Patterson*, the ownership of the appellee, and the fact of his leaving his said master on the 12th of *September* 1838, the value of his services, the kind treatment of his master, &c.; whereupon the said Orphans court, on the 31st of October 1848, acting under the acts of 1833, ch. 224, and 1845, ch. 105, "ordered, that the term of service of said *William Patterson*, (negro,) be extended for eight years from this date, and that the said *John Crookshanks* have the right of selling the said *William Patterson*, (negro,) in or out of the State of *Maryland*." From this order the defendant appealed to this court.

The cause was argued before Spence, Martin and Frick, J.

By John Thompson Mason for the appellant, and
By Boyle for the appellee.

FRICK, J., delivered the opinion of this court.

In the petition filed in this cause, before the orphans court of *Washington* county, by *Crookshanks*, the appellee, it is alleged, that the negro *William Patterson*, the appellant, being bound by bill of sale to serve said *Crookshanks* for a term of years, before the expiration of said term, absconded from him, by which for a long space of time he lost the services of said negro; and that having recently arrested and recovered him, he had brought him before the orphans court of the county, that under the provisions of the act of 1845, ch. 108, he might have the term of service of said negro extended, so as to indemnify him for the loss sustained by his absconding.

The said negro *Patterson* appears by attorney in said court, and by his answer, denies the matters charged in the petition.

To prove the title to the service of the appellant, a bill of sale from *Joseph Ford* to *John Crookshanks*, both of *Baltimore* county, dated the 10th of February 1832, is produced, by which the said negro *William Patterson*, is sold to the said *Crookshanks*, for a term of years, to expire on the 1st of January 1841. And between them, it is further covenanted in the bill of sale, that at the expiration of that time, the said negro is to be liberated, manumitted and forever set free.

This bill of sale is acknowledged before *Matthew Murray*, a justice of the peace of the city of *Baltimore;* and as appears by the record, has never been recorded.

It further appears by a power of attorney, filed as part of the record, that the appellee constituted a certain *William Crookshanks* his agent and attorney, to file the petition in this cause; and both the appellee and his agent are therein described as residents of the city of *Baltimore*.

On the hearing of this petition and answer before the orphans court of *Washington* county, that court ordered the term of service of said negro to be extended for eight years ensuing, with discretion to the appellee to sell him for that period, in or out of the State of *Maryland*. And from this order, the said negro *Patterson*,, has appealed to this court.

The principal ground of appeal, and one which is, of itself, decisive of this case, is the objection, that the orphans court of *Washington* county, had no jurisdiction in the cause. By the act of 1845, ch. 105, the several orphans courts in the State are authorized, "upon application of any owners of any slaves, for a term of years, on proof that the slave is in the habit of running away, to extend the term of service of such slave, and give the owner a right to sell him in or out of the State, as effectually, and in the same manner, as the county courts now have, under the act, to which this is a supplement." The act of 1833, ch. 224, to which the above act is the supplement, in the 4th section declares, that "upon application of any master or mistress, or other person legally authorized by such master or mistress, to the county court of the county, where such *master, mistress or their agent may reside*, it shall be lawful for such court to grant an order for the sale," &c.

Construing the supplement in connection with the original act, it is apparent, that no jurisdiction is given, either to the county courts or the orphans courts, unless the master, mistress or agent resides in the county. The supplement standing alone is inoperative. The power there given is limited, and can only be used in reference to the original act. It is to be used in the same manner, and of course, only to the same extent, as it is applied in the county courts. As "effectually," and to the extent, that the county courts may use this power; to that limit, it is permitted to the orphans courts. This limitation is written on the face of the acts, which have for their object, to give to each of these courts, a concurrent jurisdiction over the subject matter, where the parties claiming, or their agent, reside within the limits of the county. Any other construction would conflict with the whole judicial system of the State; and in a class of cases of frequent occurrence, would give to every orphans court, an expansion of jurisdiction, only limited by the boundaries of the State. This cannot be intended or assumed, as the interpretation of these acts. The master, mistress, or agent, must reside in the county where the application is made; and the residence of neither master or agent, as this record indicates, being within *Washington*

county, the orphans court there, had no jurisdiction over the subject matter of this appeal, and therefore erred in assuming it.

But it is said this appeal is *coram non judice;* that the bill of sale from *Ford* to *Crookshanks*, providing for the freedom of the negro after January 1841, if intended to operate as a deed of manumission, is void, because it was not recorded according to law; and besides, was not acknowledged before a justice of the peace of the county, where the parties resided; they being described as of *Baltimore* county, while the magistrate purports to act in and for *Baltimore* city.

The instrument thus, for the purposes of this manumission, being a nullity, the negro remains a slave, and in that character, it is contended, he has no *status* in court.

But how does this allegation consist with the conduct and course of the appellee, in this proceeding? He first arraigns him before the court as a freeman, and then to drive him from his rights and his defence as such, he invokes the instrument of his title, and its defective execution, to convert him into a slave. In the court below, he attains the object of his petition by representing him to be free, and procures a sentence of prolonged servitude against him. In this court, where the negro resorts to the remedy open to him, alike with every freeman, his appeal is to be estopped by the alleged taint of slavery, and his consequent exclusion from a legal *status* in court. If a slave, the whole proceeding against him under this act of Assembly in *Washington* county court, or any other court, is illegal and a nullity. It is a solecism to say, that as a slave, his term of service can be prolonged or extended. The law, in its express terms, and from its professed object can have no reference to a slave. The orphans court of *Washington* county, did not profess to deal with *Patterson* in that character, and the very sentence imposed by them, denies it, by adding to the previous limited term of his servitude.

In any aspect of the case as presented to us, we do not feel at liberty to leave out of it, the prominent fact stated in the petition, that the negro was only bound to serve until January 1841; for, without this fact of limited bondage, the appellee had

no case under the act of Assembly. It does not then comport with that allegation to insist now, that he is a slave, and as such must be turned out of court. The appellee brought him before the court, admitting the expiration of his term of service, but claiming indemnity for the portion of that service lost by his absconding. Upon this allegation, and the traverse of it in his answer, in the orphans court below, he is tried. Before that court, the appellee gave him the standing he now maintains here, and it is no part of our duty to disturb it. From the view before expressed on the first branch of the case, we are not called upon to pronounce upon any other point discussed in the cause. The *forum* selected by the appellee has no jurisdiction in the case, and their decision must be reversed.

JUDGMENT REVERSED.

FREDERICK BELL *vs.* THE HAGERSTOWN BANK.—*December* 1848.

A draft was regularly protested for non-payment, in *Georgetown, D. C.*, and the usual notices to the drawer and endorsers, deposited in the P. O, the same evening, by the *notary*, directed, under cover, to *B*, the cashier of the appellee in *Hagerstown*. It was then proved by B, that he had a distinct recollection of receiving these notices, and is sure that, on the same day, he sealed and directed them to the drawer and endorsers, at their respective post offices. He does not recollect the exact time of their receipt, but remembers no instance where such notices were not received in due time, *i. e.*, on the second day after their date, and should have remembered an instance of longer delay as unusual. That the bank has a regularly appointed messenger, whose duty and practice it is to come to the bank daily, about the hour of closing, when he either delivers to him all letters and notices for the P. O., or, when he leaves before the messenger arrives, places such letters carefully on his table, and there is a general understanding that the messenger is to take them. He cannot say which course was adopted in this instance, but did not find the notices on his table next morning, and has never so found them. By the *teller* of the bank, that it is his practice, when the cashier leaves before the messenger arrives, to see that the letters are taken by the latter,—is very particular in this respect, and recollects no instance where they were not taken the same day. By the *messenger*, that it was a part of his duty and his invariable custom, to be at the bank at the hour of closing, or very soon after, to take the letters

and notices to the P. O. He either receives them from the cashier in person, or, if he has left, takes them from his table. Has never failed to obtain them, and it has been his uniform custom to deposit them directly in the P. O., which he has never failed to do, except in one instance particularly described. HELD:

That this evidence of notice of non-payment to the indorser, was legally sufficient to charge him, and to warrant an instruction to the jury that if they believed it, they must find for the plaintiff.

Where the holder and the party to be notified reside in the same place, personal notice is required, or it must be left at his residence or place of business, unless, by the usage of a particular place, a different mode is resorted to.

In large commercial towns the uniform practice now is, to reach the party to be affected with notice, through the post office, when both reside within the limits of the penny-postman, but it must be shown to have been put in, in time to be delivered before the expiration of the day following the dishonor.

Where personal notice is required between parties residing in the same place, it is sufficient if it be made by the expiration of the day following the refusal.

Where the parties reside in different places, notice may be sent through the post office, to the nearest office of the party entitled to notice; and it is sufficient if it be put into the post office at any time during the day the note is payable.

The deposit of a letter in the post office, properly directed, and in proper time, is sufficient to charge the endorser without proof of its having been actually received, and a right of action accrues, without waiting for it to reach its destination.

The usages of banks have grown up to be a part of the settled law of the land, and in obedience thereto, personal notice is dispensed with, and the indorser is charged by the bare deposit of notice in the post office, even if it never comes to hand.

This case is distinguished from the cases of *Flack vs. Green*, 3 *G. & J.*, 474, and *Smedes vs. The Utica Bank*, 20 *Johns.*, 372.

The testimony of the cashier, that he "sealed and directed the notices, both to the drawer and endorser, *at their respective post offices*," must be taken to mean, that he knew the residence of both to be out of the town, and directed accordingly through the proper channel, by which notice would reach them.

Whether due diligence has or has not been used, and whether or not legal notice has been given, are questions of law, to be decided by the court, unless the evidence is doubtful or contradictory.

The possession of the note by the appellees, previously endorsed by them, through the cashier, their agent, and produced by them as their cause of action, is *prima facie* evidence of property in them, and they are to be regarded as the *bona fide* owners, notwithstanding the subsequent endorsements, and entitled to sue upon it.

It is no objection that the endorsement is in blank. The act of 1825, ch. 35, dispenses with the form of filling up the blank, so far as to sustain the judgment upon any negotiable instrument, notwithstanding the omission to fill up the blank in the endorsement.

APPEAL from *Washington* county court.

This was an action of *assumpsit*, brought by the appellees, as holders, against the appellant, as endorser of the following bill of exchange:

"$500.

HAGERSTOWN, *July 23rd*, 1844.

Ninety days after date, pay to the order of *Samuel Bell*, five hundred dollars, value received, which place to account of— DAVID BELL.

To GEO. WATERS, *Georgetown, D. C.*

Endorsed: *Samuel Bell, Fred'k Bell.*

Pay to *A. Suter, Esq.*, or order.

ELIE BEATTY, Cash."

At the trial, the plaintiffs proved by competent testimony, the handwriting of the drawer and endorsers, the endorsement by the defendant and delivery to plaintiffs, and then produced in evidence the following protest for *non-payment*.

"UNITED STATES OF AMERICA, DISTRICT OF COLUMBIA, *Washington county, to wit:*

On this, the twenty-fourth of October, in the year of our Lord, eighteen hundred and forty-four, at the request of the president, directors of the *Farmers and Mechanics Bank of Georgetown, D. C.*, bearers of the original draft, whereof a true copy is above written, I, *George Jewell*, notary public, duly commissioned and qualified, residing in the *Corporation of Georgetown*, in the district aforesaid, presented the said draft at the counting house of *George Waters*, and demanded payment thereof. I was answered by him, that he 'had no funds in hand to pay it.' Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do solemnly protest, as well against the drawer and endorsers of the said draft, as all others whom it may concern, for exchange, re-exchange, and all costs and charges, damages and interests, suffered and to be suffered for the want of payment of the said

draft. Thus done and protested at *Georgetown* aforesaid, and on the same day, I addressed written notices to the drawers and endorsers of the said draft, informing them that it had not been paid by the drawer thereof, and that they would be held responsible for its payment, and directed to *Elie Beatty, Esq.*, cashier, *Hagerstown, Md.*, and deposited in the post office, *Georgetown*, on the same day. In testimony whereof, I have hereunto set my hand and affixed my seal notarial, the day and year aforesaid. (Seal.) Geo. Jewell, N. P.

Prot., $1.75."

Also the evidence of *George Jewell*, taken under a commission in *Georgetown, D. C.*, who testified, that he was a notary public for the *District of Columbia*, duly commissioned and qualified, and was appointed in January 1842. That he had seen the draft referred to twice before, once on the 14th of October 1844, when it was put into his hands, as a notary public, by the *Farmers and Mechanics Bank of Georgetown*, for the purpose of presenting the same to the said *George Waters*, for his acceptance, and to note it for non-acceptance, if acceptance was refused, and again on the 24th of October 1844, when it was again put into his hands for presentation for payment. That on said 24th of October 1844, he presented said draft to said *George Waters* at his counting house, and demanded payment thereof, when he was answered by said *Waters*, that he had no funds in hand to pay; whereupon he protested the same for non-payment, and wrote separate notices to the drawer, *D. Bell*, and to each of the endorsers, *F. Bell, Samuel Bell*, and *Elie Beatty*, cashier, informing them that it had not been paid, and that they would be held accountable to the holders thereof, and enclosed the same under cover, directed to *Elie Beatty*, cashier, *Hagerstown*, and deposited them in the post office in *Georgetown* the same evening, and returned the draft, with protest, to the *Farmers and Mechanics Bank*, at whose request it was protested. The witness further proved, that on the 14th of October 1844, he presented the draft to *Waters* for acceptance, which was refused, which refusal witness noted on the face of the draft, as follows: "Noted for N. A., October 14th, 1844, by *G. J.*, N.

P.;" and on the same evening, wrote notices to the drawer and each of the endorsers, directed to each of them separately, and enclosed the same to *Elie Beatty*, cashier, *Hagerstown*, and deposited them, on the same day, in the post office at *Georgetown*. These notices were as follows:

"GEORGETOWN, D. C., *Oct.* 14*th*, 1844.

Take notice, that a draft for five hundred dollars, drawn by *David Bell* on *George Waters*, in favor of *Samuel Bell*, or order, dated *Hagerstown*, July 23rd, 1844, payable ninety days after date, and for which you are accountable to the holders, was this day protested for non-acceptance.

Very respectfully, &c.,

GEO. JEWELL, Notary Public.

To FREDERICK BELL, ESQ."

The witness further testified, that he kept a record of his official proceedings, but does not retain a copy of the notices, but knows that the notices hereto annexed, are substantially the same as those enclosed to *Elie Beatty*, cashier.

And to prove that notices of the non-acceptance and non-payment of said draft had been duly sent to the defendant, the plaintiffs offered to prove by *Elie Beatty*, a competent witness, that for many years prior to the date of said draft, he was and still is the cashier of the *Hagerstown Bank;* that as such, it is part of his duty, when notices of the dishonor of a bill are received, to enclose and direct the same to the drawer and endorsers thereof; that notices of dishonor are always, as he believes, put in the post office in *Georgetown*, on the day of their date, and that by the regular running of the mail, they are brought to *Hagerstown* late the next evening, and delivered at said bank next morning; that it has been his invariable practice, to seal and direct the same to the drawers and endorsers the same day he receives them; that he has a distinct recollection of receiving the notices of non-acceptance and non-payment in this case, from the surprise he felt at the draft of such punctual men being protested. And he is very sure that on the same day he received them, he sealed and directed them to the drawers and endorsers, at their respective post offices; that he has no recollection of their date when he received

them, except by reference to the papers themselves. He has no recollection of any instance wherein such notices were not received by him in due course of mail, viz., on the next morning but one after their date, and he is satisfied, that if a longer delay had occurred in this case, he should have noticed and remembered the fact, so unusual, and he is therefore confident, that the notices in this case were received on the morning of the second day after their date. He further proved, that witness does not deposit the notices or letters of the bank in the post office, but that duty is performed by a regularly appointed messenger of the bank, whose duty and practice is, to come to the bank daily, at about the closing hour, when witness sometimes delivers to said messenger all letters and notices prepared that day, to be put in the office by him. That witness sometimes leaves the bank a little earlier or before the messenger arrives, in which case witness leaves the said letters carefully upon his table, and there is a general understanding, that the messenger is to take them to the post office; he cannot remember which was done on the day he received and directed the notices in question, but he remembers directing them properly, and he did not find them upon his table next morning, nor has any instance ever occurred of finding such letters or notices on his table the next morning, nor has he heard of any instance in which they were not, as he believes, put in the office the same day. The plaintiffs further offered to prove by *William M. Marshall*, a competent witness, that at the date of said draft, and for many years before, he was and still is the teller in said bank; that said bank has been closed daily at two o'clock, and the cashier leaves generally about that hour, but that witness and the book-keeper remain sometime afterwards, to settle and adjust the accounts of the day; that when the cashier leaves the bank, before the messenger arrives for the letters, it is and has been the usual practice of witness, to see that the same are taken by the messenger, and witness generally sees them taken away, or the messenger generally takes them from the table whilst witness is in the bank; that for the last few years witness has been exceedingly particular in this respect, because, during that time, there have been almost daily

remittances of money by mail, and it was therefore necessary to be careful that letters were delivered to the messenger; and witness has no recollection of any instance of the letters and notices prepared during the day, which were not taken from the bank to be put in post office on the same day. The plaintiffs further offered to prove by *John Anderson*, a competent witness, that from a period long anterior to the date of the draft in question, he has been the messenger of the said bank, duly appointed by the president and directors; that as part of his duty, it is and has been his invariable custom and practice, to be at the bank at the hour of its closing, or very soon afterwards, sometimes an hour afterwards, to take the letters and notices of the bank to the post office; that sometimes he receives them from the cashier in person, or, if he has left the bank, from the cashier's table, where they are found laid, one or the other; that he so takes them before the other officers have left the bank, and in their presence, and he has no recollection of any failure so to obtain them, and it has been his uniform custom, to deposite them directly in the post office; that he has never failed to put them in the office the same day; once, however, about six months ago, there was a letter to one of the *Baltimore* banks, (as he thinks,) which was not ready at the usual time, and being delivered to him later in the day, he neglected to put it in the office until next morning; he has no particular recollection of the notices in question, but is very sure, that if delivered to him or found upon the cashier's table, as aforesaid, he deposited them in the office the same day, and he remembers seeing the name of the defendant and other *Bells* on some letters so put in the office, he thinks perhaps two years ago, and since that time and before, but cannot tell at what time; that notices of protest are folded and sealed differently from letters, and he never failed to deliver such in the office the same day. To the foregoing evidence the defendant objected, as being incompetent and inadmissible to prove, that notice of the non-payment of the said draft was received by or given to the defendant, but the court overruled the objection and permitted the said evidence to be given to the jury, and thereupon instructed the jury, that said testimony

was evidence to prove, that notice of non-payment of said draft was given to the defendant in due time, and if they believed the said evidence, their verdict must be for the plaintiff. The defendant excepted and appealed to this court.

The cause was argued before Dorsey, C. J., Spence and Frick, J.

By Jervis Spencer for the appellant, and
By J. Dixon Roman for the appellees.

Frick, J., delivered the opinion of this court.

This action was brought against the appellant, as the endorser of a bill of exchange, of which the following is a copy:

"$500.

Hagerstown, *July* 23*d*, 1844.

Ninety days after date, pay to the order of *Samuel Bell*, five hundred dollars, value received, which place to account of— David Bell.

To George Waters, *Georgetown, D. C.*

Endorsed: *Samuel Bell, Frederick Bell.*

Pay to *A. Suter, Esq.*, or order.

Elie Beatty, Cashier."

The note thus in the possession of the *Hagerstown Bank*, of which *Elie Beatty* was the cashier, had been transmitted to said *Suter*, to be collected through the agency of the *Farmers and Mechanics Bank of Georgetown*. It was there regularly protested, for non-payment at maturity; whereupon the notary addressed separate notices to the drawer, and to each of the endorsers, informing them, that it had not been paid, and they would be held accountable to the holders; and enclosed the notices directed under cover, to "*Elie Beatty*, cashier, *Hagerstown*," and deposited them in the post office, in *Georgetown*, the same evening.

The appellee then proved by said *Beatty*, the cashier, that he had a distinct recollection of receiving these notices; and is very sure, that on the same day he sealed and directed them to the drawers and endorsers, at their respective post offices. That he had no distinct recollection of the date when he

received them, except by reference to the papers themselves; nor of any instance, wherein such notices were not received by him in due course of mail; and is confident these notices were received in time, that is, on the second day after their date, because he should have noticed and remembered the fact of a longer delay, as unusual. That the bank has a regularly appointed messenger, whose duty and practice it is, to come to bank daily, about the closing hour, when sometimes, he delivers to him all letters and notices for the post office, and sometimes, when he leaves the bank before the messenger arrives, he places such letters carefully on his table, and there is a general understanding, that the messenger is to take them to the post office. He cannot remember which course was adopted on this occasion. He did not, however, find the notices on his table the next morning; nor has an instance ever occurred of so finding them.

He further proved by the teller of the bank, that when the cashier leaves the bank, before the messenger arrives, it is his practice to see that letters are taken by the messenger, and he generally sees it done, or the messenger takes the letters himself from the table. That he has been exceedingly particular in this respect, and has no recollection of an instance, when they were not taken from the bank on the same day.

He further proved by *Anderson*, that he was the appointed messenger of the bank. As part of his duty, it has been his invariable custom and practice, to be at the bank, at the hour of closing, or very soon after, to take the letters and notices to the post office. That sometimes he receives them from the cashier in person, or if he has left the bank, takes them from the cashier's table, one or the other. That he has no recollection of any failure so to obtain them; and it has been his uniform custom to deposite them directly in the post office. That he has never failed to put them in, on the same day; except on one occasion, when a letter to one of the *Baltimore* banks, was delivered to him later in the day, it was neglected by him until next morning.

To this evidence, the defendant objected, as being incompetent, and inadmissible to prove, that notice of the non-payment

of the said draft was received by, or given to the defendant. But the court overruled the objection, and permitted the evidence to be given to the jury, and instructed them, "that said testimony was evidence to prove, that notice of the non-payment of said draft was given to defendant in due time; and if they believed the said evidence, their verdict must be for the plaintiff." And upon exception to this instruction, the case comes before this court for revision.

The question here presented is, was the evidence of the notice of the non-payment of the note, upon which this suit was brought, legally sufficient to charge the endorser, and to warrant the instruction to the jury, that if they believed it, they must find for the plaintiffs.

To arrive at the proper answer to this enquiry, it is necessary first to recur to what is deemed a legal and sufficient notice, within the authorities that control this branch of commercial law. It has now become text law, so often affirmed by reiterated decisions, that it is only requisite for the present purpose to state it in brief.

Demand and notice are conditions precedent to every holder's right to recover, and the endorser is entitled to strict notice. Wherever the holder of the bill, and the party to be notified, reside in the same place, personal notice is required, or notice must be left at his residence or place of business; (*Smith's Merc. Law* 251; 15 *Maine Rep.*, 141,) unless by the usage of a particular place, a different mode of notice is resorted to. As in large commercial towns, it is now the uniform practice, to reach the party to be affected by the notice through the post office, when the parties both reside within the limits of the penny-postman. "But it must be shewn to have been put in, time enough to be delivered before the expiration of the day following the dishonor." *Smith's Merc. L.*, 250, and cited 4 *Tyrwh.*, 1002, in note *(y.)* The particular custom of the place is made to decide the question. 1 *H. & J.*, 427. *Bank of U. S. vs. Norwood.* And in these cases, where personal notice is required between parties residing in the same place, it is sufficient, if made by the expiration of the day following the refusal. *Smith's Merc. Law*, 250, and cases there cited. When

the party to be charged by the notice resides in a different place from the holder, notice may then be sent through the post office, to the nearest office of the party entitled to the notice. *Bank of Columbia vs. Magruder*, 6 *H. & J.*, 181. 1 *Wheat.*, 298. And it is sufficient if the notice of non-payment is put into the post office at any time during the day the same is payable. *Chitty, (8th ed'n,)* 514, 515. The deposit of a letter in the post office, properly directed and in proper time, is sufficient to charge the endorser, without proof of its having been actually received. *Saunderson vs. Judge*, in 2 *H'y Bl.*, 509, is the earliest case affirming the doctrine, and it has ever since been adhered to. It is in itself a plain rule, and it has always been considered unsafe to depart from it. See also 6 *Taunt.*, 305. 17 *East.*, 385. 6 *H. & J.*, 181. It is now so well settled, that a right of action accrues thereon, without waiting for the notice to reach its destination. 15 *Maine*, 67. 3 *Pick.*, 414. 4 *Greenl. R.*, 479.

In the case before the court, there is no difficulty in assuming, that if the letter was put into the post office, it was done on the same day that the notices reached *Hagerstown*, and was consequently in due time. Nor can we entertain a doubt, that the evidence in the cause is legally sufficient to establish the fact of its having been done. What evidence, short of the actual manual deposit of this notice in the post office, can be given more directly to the point? Is not the whole of it, taken together, fully equivalent to the establishment of that fact? If the messenger of the bank had gone one step further, and sworn to the fact as within his recollection, (without some special circumstance to charge his memory with the fact,) would it be credited? That among the notices which he delivered daily throughout the year, and which indicated nothing to him beyond the external address, nothing to attract his special attention, he should have recollected this one in particular? The practise to which he testifies, must render it next to impossible, that he should have such distinct recollection of each notice in particular. And yet nothing short of this is required, if such evidence is rejected as doubtful. Looking to this practice, (and the numerous cases in the books, sanction it as the uni-

form practice of all banks,) is not testimony of this character the best that the nature of the case admits of? The business of banking is a distinct operation in commerce, recognized in almost every State in the Union, by the incorporation of banks; and their usages have grown up as a part of the settled law of the land. In obedience to this usage, it is that the law dispenses with personal notice, and charges the endorser by the bare deposit of the notice in the post office, if in due time, even if the notice never comes to hand. The importance of fixed and uniform rules in reference to mercantile dealings, has converted usage into law. It is adapted to expedite commercial and banking operations. Any rule, less liberal, would embarrass them.

The rule, however, it is said, must be strictly complied with; reasonable and due diligence must be proved in order to charge the endorser. We regard the evidence in this cause as a sufficient compliance with the rule. The course and practice of the bank, as proved, is entirely consistent with what the law requires. The notice was received at the bank in time. It was enclosed and directed by the cashier to the proper post office in time, and then delivered to the messenger, or laid upon the cashier's table. Such is the purport and legal effect of the cashier's testimony. Equally so, is the effect of the testimony from the messenger, that he received this notice from the cashier, or took it from his table, and deposited it on the same day in the post office. If he never omitted to do so, there could be no omission in this instance. From the practice to which he testifies, he would be the more likely to recollect an omission, if it did occur; and if, as he swears, there was no omission in any instance, (save the one to which he refers,) it may be said to be affirmatively proved, that there was none in this. The usage of the bank, seems to have been characterized by accuracy and certainty, to attain its object, and the evidence leaves no room to doubt, but that the notice reached the office. In the absence of all contradictory testimony, the fact, that this notice was properly disposed of by the messenger, seems to be irresistable. It is not in the nature of things, from this course of business in the bank, sanctioned by law and usage, to prove

more. And to ask the witness, under the circumstances, to bring his recollection to bear upon the particular notice here in question, is to require too much.

The case of *Flack and Green*, 3 *G. & J.*, 474, so strongly urged in favor of the appellant, is easily distinguished from the case at bar. The letter containing the notices had been mailed at *Washington* in due time, and addressed to the house of *Payson & Co.*, in *Baltimore;* and it was proposed to prove by the witness, one of the firm, "that it was the invariable practice of that house to forward such notices immediately on the receipt of them, and that he had no doubt, from the course of their business, that they had forwarded this particular notice, but that he had no recollection upon the subject of forwarding it. That from the general course of their business, and from the particular custom of their counting house, in respect to such notices, he believes that the notice in question had been duly transmitted." And similar testimony was offered from the clerks of the house, but it was all properly rejected by the court. And although no reason is assigned, yet it was manifestly too loose and vague to raise the presumption it was intended to convey. Time, the essential ingredient in the notice, is indefinite. It does not appear when the letter was received by the house, or how soon after it, the notice, was forwarded to the endorser. It does not prove, through what channel or direction, by whom or whose business it was among the partners and clerks of the house, to see it expedited, and whether it was forwarded by mail or personal message. There is nothing in the evidence to warrant a legal inference, that it was the particular duty of any one of the firm or the clerks, to see that a proper direction was given to the notice, by which it might reach the endorser. Strict notice, as was said, is required to charge the endorser. In most instances it may be through the post office; in others, it is essential that it should be personal. In this case the evidence was altogether too indefinite to gratify the requirements of the law, and the court very properly rejected it.

The case cited from 20*th Johns.*, 372, *Smedes vs. Utica Bank*, is likewise to be distinguished from the case at bar.

There all the parties *resided in the same town*, and the testimony of the witness is, "that he delivered a notice, either at the post office or at the office of the party, but which of the two he could not tell." Here it will be perceived, in the language of the court, on page 383, "the notice in one place would be sufficient, in the other a nullity." On the ground, therefore, that the party was entitled to personal notice, and the proof being equivocal, the testimony was rejected.

On the contrary, in the case of *Warren vs. Gilman*, 17 *Maine R.*, 360, where the bill was drawn by residents of *Bangor*, made payable in *Boston*, being endorsed to a bank in *Bangor*, it was transmitted to *Boston*, and there presented for payment and dishonoured, and the notices thereof transmitted to *Bangor* by the notary, by the first mail; the cashier of the bank testified, "that on the receipt of them, which was in due time, he directed one of the notices to the endorser, and either gave it to him in person, on the same morning of receiving it, or put it into the post office in *Bangor*, on that same morning;" the court determined, that it was notice to charge the defendant: because, as said, "in this case *either mode* was sufficient. If delivered to him in person, there could be no question; and we are of opinion, that the notice coming from the notary, the post office was a proper channel of communication," the notary residing in a different place from the party charged by the notice.

In this connection, it may be the proper place to notice the objection taken by the appellant's counsel, that as the fact of the residence of the endorser does not appear upon the record, it must be presumed to conform to the note, which is dated at *Hagerstown*, and consequently the notice should have been personal, or left at his dwelling. Assuming the law, however, to be as stated in this latter case, and the notices here under consideration having been transmitted by the notary from *Georgetown*, *either notice* would be sufficient. If the appellant had actually resided in *Hagerstown*, the notice, originating with the notary in *Georgetown*, from the dishonour of the bill there, was, by the rule in the above case, sufficient to satisfy the law, if put into the post office.

But the true answer to this objection, properly appears in the testimony of the cashier, where it is said, he "sealed and directed the notices, both to the drawer and endorser, *at their respective post offices*," and this must be taken to mean, that he knew the residence of both to be out of the town, and directed to them accordingly through the proper channel, by which notice would reach them.

We find the case in 4 *Alabama Rep.*, 590, *Ball vs. Bank of Alabama*, a nearer parallel to the case before us. There the cashier testified, "that in due course of mail, he received a package containing a hundred or more protests; that he had no distinct recollection of the one in question, but does not doubt it was regularly received; and that notices were enclosed, addressed and mailed, *on the same day*, to the endorsers, as was his constant practice. If he had received the protest under circumstances indicating that it had not been transmitted in due season, it would have been noted according to the invariable practice of doing business in the bank." The court here observe, "the facts stated are quite convincing, and inconsistent with the idea that notice was not duly received by the plaintiff, and addressed and mailed in due season to the defendant," &c.

Another case, to be found in 4 *Alab. R.*, 148, is there referred to, under like evidence and circumstances, to which we merely refer, with a view to an extract from the opinion of the court, having some application and analogy to the case now before us. In reference to this practice of banks, it is there said: "Such a course of business, if pursued, would have furnished sufficient evidence for the presumption, that what was usual to be done in all cases, was not omitted in the particular one. This is the usual course of evidence by a large class of persons, such as public officers, notaries and clerks. Where the business performed by them is of great extent, it is highly improbable, from the nature of things, that any precise remembrance shall exist of one fact, which has nothing to distinguish it from a multitude of others of the same nature,—hence it is, that evidence of this general character is admissible."

Another objection, upon which great stress has been laid by the counsel for the appellant, is, that the court erred in taking

the testimony from the consideration of the jury, by the positive instruction, that if they believed the evidence they must find for the plaintiff. Upon a careful examination of the authorities, however, we think there is no error in this instruction of the court, and they have not invaded the province of the jury. It is conceived of primary importance in all commercial transactions, that fixed and settled principles should prevail. In no branch of the mercantile law is it more necessary that uniform rules of decision should be established, than in the one now under consideration. And in the case of *Ransom vs. Mack*, 2 *Hill*, 595, it is justly remarked by the court: "If such questions are to be submitted to a jury, a party may be discharged to-day, and be made liable to-morrow upon the very same state of facts."

It is therefore now the settled doctrine, that due diligence and notice is a question of law. When all the facts are ascertained, this question of liability is to be settled by the court. "The enquiry is not what inferences the jury may draw, but what testimony does the law require." *20th Johns.*, 383, before cited.

Nothing short of clear proof of notice can fix the liability of the endorser. He is entitled to this protection, but he must take it from the court, as the least liable to render this protection doubtful or fluctuating. Therefore, whether due diligence has or has not been used, and whether or not legal notice has been given, are questions of law to be decided by the court, unless the evidence is doubtful or contradictory. It is only in such cases that the jury are called upon to decide. The principle is found distinctly stated in numerous cases. "When all the facts are ascertained, and there is no controversy about them, diligence is a question of law." 15 *Maine R.*, 263. *Thome vs. Rice*, 3 *Hill*, 520. "What is reasonable notice is a question of law, upon the facts proved." 17 *John's R.*, 453. "This results," says *Spencer, J.*, in *Bryden vs. Bryden*, 11*th Johns.*, 187, "from the necessity of having some fixed legal standard, by which men may not only know the law, but be protected by it."

The result of all the authorities examined is, that the law requires of every holder of negotiable paper, reasonable diligence in conveying to the party to be charged notice of the dishonor of the bill; and where there is no dispute about the facts adduced in evidence, whether such diligence has or has not been used, is a question of law for the court.

In further support of the doctrine, we quote from the language of the Supreme Court, in the case of the *Bank of U. S. vs. Corcoran*, 2 *Pet.*, 134: "If this was a question of inference fit to be submitted to the discretion of the jury, it seems to the court, that the rules respecting this subject, which have been laid down with so much care, would no longer be fixed and certain, but would change with the varying conclusions which a jury might draw of the fact, from evidence, however slight, given to prove it." And in a more recent case in that court, reported in *2nd How.*, 457, *Rhett vs. Poe*, it is said, upon page 481: "It is a doctrine generally received, one which is recognized by this court in the case of the *Bank of Columbia vs. Lawrence*, 1 *Pet.*, 578, that whenever the facts upon which the question of due diligence arises, are ascertained and undisputed, due diligence becomes a question of law." See also 21 *Wendell*, 643.

We may here safely close this array of authorities by a reference to the rule on this subject, long ago announced in our own State, in 1 *H. & J.*, 187, *Philips vs. McCurdy*, "that notice of the non-acceptance and protest of a foreign bill of exchange must be given in due and convenient time, of which the court are to judge." And in the same volume, on page 477, in the case of *Patton and Jones, vs. Wilmot*, the rule is repeated: "That it is the province of the court to determine, whether or not due diligence has been used."

There is no force in another objection of the appellant, that the appellees have no such interest in the note in question, as to entitle them to recover in this action. The possession of the note, previously endorsed by them, through the cashier, their agent, and produced by them as their cause of action, is *prima facie* evidence of property in them. It has the endorsement of *Elie Beatty*, not in his own name, but in his character

of cashier, as the proper officer of the bank, in whose name such evidences of property are received and transferred. And they are to be regarded as the *bona fide* owners, notwithstanding the subsequent endorsements, and entitled to sue upon it. 1 *G. & J.*, 175, *Bowie vs. Duvall.* It is no objection that the endorsement is in blank. Since the decision on this point, in the *Cumberland Bank vs. McKinley*, 6 *H. & J.*, 527, affirming this doctrine, the act of 1825, ch. 35, dispenses with the form of filling up the blank, so far as to sustain the judgment given upon any negotiable instrument, notwithstanding the omission to fill up the blank in the endorsement.

Upon the whole case, then, the facts being deemed by this court sufficient to establish due diligence, in the absence of all doubtful or contradictory testimony, we are of opinion, that the court below were right in taking the question into their own hands, and instructing the jury, that if they believed the facts, they must find the verdict as directed by the court. The judgment of the court below is therefore affirmed.

JUDGMENT AFFIRMED.

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ISAAC BEALL, WM. T. BEALL AND OTHER'S LESSEE, *vs.* NELSON BEALL AND JOHN HENDRIXON.—*Dec'r* 1848.

Where a prayer omitted material facts, of which testimony had been offered, and which were essential to raise the question upon which, by the prayer, the decision of the court was invoked: HELD, that it was properly rejected.

The court being of opinion, that the substantial merits of the case were not determined by the affirmance of the judgment of the court below, the cause was remanded with a procedendo under the act of 1830, ch. 186.

APPEAL from *Allegany* county court.

This was an action of *ejectment*, brought by the lessors of the appellant, in 1846, against the appellees, for a certain lot of ground situated in the town of *Cumberland*, and described in a plat of said town as "lot No. 280," being part of a tract of land called "*Walnut Bottom.*"

At the trial, the plaintiffs to support the issue on their part, offered in evidence the patent for the tract of land called "*Walnut Bottom*," granted to *George Mason* on the 25th of March 1756, and also the will of *Thomas Beall, of Samuel*, duly executed, to pass real estate on the 16th of November 1823, and duly admitted to probate on the 9th of December of the same year, by which the testator devised and bequeathed "all the rest and residue of my estate, both real and personal, to be equally divided among my eight grand-children, to wit: *William T. Beall, Benjamin M. Beall, Joseph T. Beall, Isaac W. Beall, Samuel B. Beall, Daniel Beall*, and *Elizabeth B. Beall*, children of my son, *Isaac Beall*, to them, their heirs and assigns, forever, in equal portions, share and share alike."

They then proved, that the lessors of the plaintiff were the residuary devisees named in said will; and further proved by *Henry Wincow*, a competent witness, that he came to the town of *Cumberland* in 1792, and is now seventy-seven years of age. That when he came to said town, *Thomas Beall, of Samuel*, was in possession of the tract of land called "*Walnut Bottom*," claiming title to the same and exercising acts of ownership over it; that said *Beall* had previously laid out the town of *Cumberland* on said tract of land called "*Walnut Bottom*," and sold out town lots to different purchasers before the year 1792. That witness has been a citizen and resident of said town from the year 1792 to the present time; that he never knew of *George Mason*, or any of his heirs, being in said town, or laying claim or title to said tract of land, but that the said tract remained in the possession of said *Beall*, except such parts thereof as he had previously sold as town lots, and otherwise, from the year 1792 to the time of his death, in the year 1823 or 1824. They then proved, that the lot in controversy was one of the town lots thus laid off by said *Beall*, and designated upon the plot of said town as lot No. 280, and was part of and within the lines of "*Walnut Bottom*." They then further proved by said *Wincow*, that in the year 1797, said *Beall* took witness and some seven or eight other citizens, neighbors, who lived near to said lot, and it was agreed, that

if said *Beall* would give the lot, they would erect a market house thereon for the use of the citizens of the town. It was understood at the time, that it was given for the purpose of a market house, and for no other purpose; and from what passed at the time between said *Beall* and witness, and the other citizens, witness thought that the gift as made, was for the purpose of a market, and for no other purpose, and that such was the understanding, both of said *Beall* and said citizens; that witness, during the same year, erected upon said lot a market house, and was paid for the same by the citizens, and that the public has had possession of said lot from the time it was given until it was sold. It was then admitted, that no deed or other conveyance was made by said *Beall*, for said lot, to any persons. It was further admitted, that the town of *Cumberland* was first incorporated in 1815, and that in the year 1822 or 1823, the corporate authorities of said town had a new roof put upon said market house, and that eight or nine years ago, they had a wall built on the west side of said lot, binding on *Wills Creek*, intending to keep up said lot as a market house. It was further proved by said *Wineow*, that the market house erected by him in 1797, was used as a market house for eight or nine years, and then fell into disuse, because the patronage did not justify the butchers and country people going to market; that said market house remained standing upon said lot, until after the same was sold by the corporation of *Cumberland* to the defendants, in the year 1843. It was further admitted, that said lot was all the time known and called the market house lot, after the erection of said market house, and that from the year 1797 up to the time of the sale of said lot to the defendants, there was no other market house or market place in said town.

The defendants then offered in evidence the act of Assembly of 1842, chap. 33, by which it was enacted:

"That the mayor and councilmen of the town of *Cumberland*, in *Allegany* county, be, and they are hereby authorised and empowered, in their discretion, to sell and convey, by deed, in fee-simple, a certain lot or parcel of land lying and being in said town, and described in the plat of *Beall's* addi-

tion to said town as lot number 280, beginning," &c., "and to apply the proceeds of said sale to the erection of a new market house in said town."

"Sec. 2. And be it enacted, that a deed of bargain and sale, executed under the hand and seal of the mayor, and the hands and seals of the councilmen of said town, for the time being, or a majority of them, shall be held and deemed sufficient and effectual to vest a good title, in fee-simple, in the purchaser or purchasers of said lot or parcel of land." Also a deed duly executed and recorded, bearing date the 2nd of July 1843, from the mayor and councilmen of the town of *Cumberland*, conveying the said lot to the defendants.

It was further admitted, that since the sale of said lot to defendants, the said defendants have pulled down said market house, and are using and claiming the same as their individual property. That the corporate authorities of said town have since purchased another lot and erected a permanent market house thereon, where market is now regularly held. It was further admitted, that the money arising from the sale, was appropriated for the purchase in part of said last mentioned lot. Upon which the said plaintiffs offered the following prayer:

The plaintiffs, by their counsel, pray the court to instruct the jury, that if they shall believe from the evidence in the cause, that *Capt. Thomas Beall, of Samuel*, was in possession of the lot in controversy, as part of "*Walnut Bottom*," in the year 1792, and continued in the possession thereof, claiming and using it as his own, up to 1797, and that *Capt. Thomas Beall, of Samuel*, only intended to permit the inhabitants of *Cumberland* to use the lot in controversy as a market place, for building a market house, and using it as such so long as the inhabitants might think fit to use the same for said purpose; and if they shall further believe from the evidence in the cause, that said inhabitants held possession of said lot under the permission of said *Beall*, as aforesaid, for a period, which, together with *Beall's* own possession, would constitute a possession for more than twenty years, that then they may presume a deed from *Mason*, the patentee, to the said *Thomas Beall, of*

*Samuel*, which was rejected by a division of the court. The plaintiffs thereupon excepted and appealed to this court.

The cause was argued before Dorsey, C. J., Spence, and Frick, J.

By Evans and Perry for the appellants, and
By McKaig for the appellee.

Spence, J., delivered the opinion of this court.

In this case, it is the opinion of this court, that the county court properly refused to give the instruction asked by the plaintiffs' prayer, inasmuch as it omitted several material facts, of which testimony had been offered, and which were essential to raise the question on which, by the prayer, the decision of the court was invoked.

We therefore affirm the judgment; but as it does not appear to this court, that the substantial merits of this case are determined by the judgment, the clerk of this court is directed, under the provision of the act of 1830, ch. 186, to return the transcript of the record to the clerk of Allegany county court, with a writ of *procedendo.*

JUDGMENT AFFIRMED AND CAUSE REMANDED, WITH PROCEDENDO UNDER THE ACT OF 1830, CH. 186.

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Samuel Crockett *vs.* Margaret Parke.—*December* 1848.

An appeal will not lie from the judgment of a county court superseding a writ of *certiorari*, by which proceedings before magistrates, under the act of 1793, ch. 43, against a tenant holding over, were brought before said court.

The right of appeal, given by the 6th sec. of the act of 1785, ch. 87, is confined to judgments of the county court in civil suits, actions or prosecutions originating therein, and does not extend to its judgments, when acting as an appellate tribunal, or when exercising a *quasi* appellate jurisdiction.

The uniform judicial interpretation of this act, from its passage to the present time, has denied the right of appeal from judgments of county courts, on appeals from judgments of justices of the peace, rendered under the acts of Assembly for the speedy recovery of small debts, on motions for new

trials, for the postponement or continuance of a cause, or any other matter resting exclusively in the sound discretion of the county court.

Appeal from *Baltimore* county court.

Upon the application of the appellant, a writ of *certiorari* issued out of *Baltimore* county court, directed to *Samuel D. Price* and *John Wise*, two justices of *Baltimore* county, commanding them to bring before said court certain proceedings had before them, instituted by *Margaret Parke*, the appellee, against the appellant, under the act of 1793, ch. 43, for a forcible entry and detainer.

The principal informality in the proceedings before the justices, alleged in the application, was, that the jury, before they had agreed upon their inquisition, separated without consent of the appellant, and afterwards came together and signed the inquisition.

The court, upon the return of the writ and after examination of the proceedings, ordered the same to be superseded and the clerk to return the proceedings to the justices, and the sheriff to proceed in execution of the writ of restitution.

From this order the present appeal was taken by the appellant, which the appellee moved this court to dismiss.

The cause was argued before Dorsey, C. J., Spence, Martin, Magruder and Frick, J.

By Stewart and Gwinn for the appellant, and
By T. P. Scott for the appellee.

Dorsey, C. J., delivered the opinion of this court.

On the motion to dismiss the appeal before us, the only question for our determination is, does the sixth section of the act of 1785, ch. 87, warrant such an appeal? If it does, then the motion to dismiss must be over-ruled; if it does not, then the present appeal must be dismissed. In 2 *Tidd's Prac.*, 1188, it is said, "that whenever a new jurisdiction is erected by act of Parliament, and the court or judge that exercise this jurisdiction, act as a court or judge of record, according to the course of the common law, a writ of error lies on their judg-

ments; but when they act in a summary way, or in a new course different from the common law, then a writ of error lies not, but a *certiorari*." If this be true, and of its correctness there cannot be a doubt, it is apparent, that the county court, in acting on the proceedings brought before it by the *certiorari*, exercised a jurisdiction of an appellate character. After the exertion of that limited appellate power, all cognizance of the subject matter by the county court was at an end. Unless it be derived from the act of 1785, there is no act of Assembly which, in terms, or by any reasonable implication, gives to this court any authority to review such a proceeding of the county court. On the contrary, the provisions of the act of 1793, ch. 43, furnish the strongest grounds for the rejection of any such implication. It is entitled, "an act to provide a summary mode of recovering the possession of lands and tenements, holden by tenants for years, or at will, after the expiration of their terms." And the expedition with which its enactments are required to be executed, is inconsistent with the right of appeal, by which this case has been brought before us. The recognition of such a right would, for the most part, if not wholly, defeat every object of the act of Assembly, contemplated by the legislature in its passage.

To the possession of such an appellate power, this court can prefer no claim, unless it be derived under the sixth section of the act of 1785, ch. 87, which enacts, "that any party or parties aggrieved by any judgment or determination of any county court, in any civil suit or action, or any prosecution for the recovery of any penalty, fine or damages, shall have full power and right to appeal from such judgment or determination to the general court." The appellate powers of the general court, upon its abolition, were transferred to the Court of Appeals. To give to this section of the act of 1785 a literal construction, its terms are certainly broad enough, not only to confer on this court the jurisdiction it is now called on to assume, but to invest it with full appellate powers, over every judgment or determination, of any nature or description, which may be pronounced by a county court, "in any civil suit or action." Literally to interpret this act of Assembly, and the

right of appeal exists from all judgments or determinations in civil actions of a county court, on motions for new trials, for the postponement or continuance of a cause, for the amendment of pleadings, or any other matter resting exclusively in the sound discretion of the county court. And yet from the passage of the act of 1785, down to the present day, its judicial interpretation has denied, in such cases, the existence of the right of appeal. So also a like denial to the appellate power of this court, has again and again been pronounced by this court, on appeals brought before it from the judgments of county courts, on appeals from the judgments of justices of the peace, rendered under the acts of Assembly for the speedy recovery of small debts. And a principle, equally decisive against the right of appeal in the case before us, and against the literal construction of the act of 1785, was adjudicated by the Court of Appeals, in the case of the *Wilmington and Susquehanna Rail Road Company vs. Condon*, 8 *Gill & John.*, 443, and in the case of *The Savage Manufacturing Company vs. Owings*, 3 *Gill*, 498.

From a careful consideration of the 6th section of the act of 1785, ch. 87, and the adjudications upon it, which have been made by this court, we are of opinion, that the right of appeal thereby given, was confined to judgments or determinations of the county court, in civil suits or actions, or prosecutions originating therein, and did not extend to its judgments or determinations, when acting as an appellate tribunal; not, as in the case before us, where it was exercising a *quasi* appellate jurisdiction. The appeal in this case is dismissed.

APPEAL DISMISSED.

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JOHN S. SELBY AND JOHN ERRICKSON, USE OF JOHN W. WILLIAMS, *vs.* PHILIP CLAYTON.—*December* 1848.

A party, who is a legal plaintiff on the record, and as such responsible for the costs of the suit, is an incompetent witness in the cause, upon the ground of interest.

The act of 1801, ch. 74, sec. 10, does not absolve legal plaintiffs on the record from responsibility for costs of the suit. The security provided by that act is cumulative.

When judgment is for the defendant, the costs are always adjudged against the legal plaintiff on the record, and the successful party may either proceed against him for costs, or against the *cestui que use*, as provided by the act of 1801, ch. 74.

APPEAL from *Anne Arundel* county court.

This was an action of *assumpsit*, instituted by *Selby* and *Errickson*, for the use of *Williams*, against *Clayton*, the appellee, to recover the value of certain goods sold by *Selby* and *Errickson* to the defendant.

The pleas were: 1st. *Non assumpsit*. 2nd. Limitations. 3rd. Set-off.

The plaintiffs joined issue upon the two first pleas, and pleaded limitations to the third, upon which the defendant joined issue.

1ST EXCEPTION. The plaintiff offered *John S. Selby* as a witness, he having, subsequent to the accruing of the account on which this action was brought, and to the assignment thereof to said *Williams*, obtained a final discharge as an insolvent debtor from this court, bearing date the 27th of October 1845, and *F. H. Stockett* having been appointed his trustee, and bonded as such to the satisfaction of this court, and received an assignment and delivery into his possession of all the goods and chattels, rights and credits, and property of every description, of which the said *Selby* was possessed at the time of his application for the benefit of the acts of Assembly, in such case made and provided. The defendant objected to said *Selby* as an incompetent witness, on the ground of his being a party to the record, he having proved that said witness and *Selby*, one of the legal plaintiffs, were one and the same person. The court sustained the objection. Whereupon the plaintiff tendered the following release:

"For value of him received this day, I hereby release, transfer and assign unto *F. H. Stockett*, all my right, title and interest in and to the goods, chattels, rights and credits, and all property of every description, and in and to any residue or re-

mainder in my estate, real, personal and mixed, or the proceeds thereof, which may be in the hands of the said *Stockett* after payment of all my debts and liabilities, in the due course of the settlement thereof, according to law, as witness my hand and seal, this 22nd day of April 1847.

JOHN S. SELBY, (Seal.)"

And then prayed that the said *Selby* be admitted as a competent witness, but the court, (DORSEY, C. J., and BREWER, A. J.,) being divided, the prayer was lost. The plaintiff excepted and appealed to this court.

The cause was argued before SPENCE, MARTIN and FRICK, J.

By FRANK H. STOCKETT for the appellant, and
By RANDALL for the appellee.

MARTIN, J., delivered the opinion of this court.

In this case, an action of *assumpsit* was instituted in *Anne Arundel* county court, by *John S. Selby* and *John M. Errickson*, for the use of *John W. Williams*, to recover the value of certain goods sold and delivered by *Selby* and *Errickson* to the appellee.

The defendant pleaded *non assumpsit*, limitations, and set-off. Issues were joined by the plaintiffs upon the first two pleas, and the statute of limitations pleaded to the defendant's set-off, in which the defendant joined issue.

At the trial of the cause, *John S. Selby*, one of the legal plaintiffs, was offered as a witness to maintain the issues on the part of the plaintiffs, who, it was alleged, subsequent to the accruing of the account upon which the suit was brought, and of the assignment to *John W. Williams*, had obtained a final discharge as an insolvent debtor.

The defendant objected to the competency of this witness, on the ground of his being a party to the record. This objection the court sustained.

A release was then tendered from *Selby* to his trustee, of all his interest in his estate, as an insolvent debtor, and, in this condition of the case, the counsel for the plaintiffs again intro-

duced *Selby*, and prayed the court to receive him as a competent witness.

Upon this prayer the court was divided in opinion, and the witness rejected. And whether the court was right in thus ruling the proposed witness to be incompetent, is the only question raised for our examination by this bill of exceptions.

This question is free from all difficulty. In the case of *Lizardi against Cohen*, 3 *Gill Rep.*, 431, the Court of Appeals held:

"That, as a general rule, a party to the record is not a competent witness, for he is generally either interested in the object of the suit, or responsible for costs."

They said:—

"The form in which this rule of exclusion has been stated by the courts, presupposes that it is subject to exceptions, and when it appears that the party proposed to be examined, is not responsible for the costs of the suit and has no interest in the subject of dispute, and is willing to be sworn, he is not within the operation of the general rule."

What then was the predicament of the person proposed to be introduced as a witness in this cause?

He was one of the legal plaintiffs upon the record, and, as such, unquestionably responsible for the costs of the suit.

The court, therefore, was correct in holding, that *Selby* was an incompetent witness. Not upon the mere objection that he was a party to the record, but that being one of the legal plaintiffs on the record, he was, under the circumstances of the case before them, liable for the costs, on the event of a recovery by the defendant, and disqualified from testifying, upon the ground of interest.

The counsel for the appellant is in error, in supposing that the legal plaintiffs on the record were absolved from all responsibility for the costs of the suit, by the provisions of the 10th section of the act of Assembly of 1801, ch. 74.

The security provided by that act, is cumulative in its character.

When the judgment is rendered for the defendant, the costs are always adjudged against the legal plaintiff or plaintiffs upon

the record, and the successful party has the right either to proceed against the legal plaintiff for his costs, or against the *cestui que use*, in the mode prescribed by the 10th section of the act of 1801, ch. 74.

For these reasons, we think the ruling of the court below, with respect to the incompetency of this witness, was correct, and the judgment is affirmed.

JUDGMENT AFFIRMED.

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PETER MONG *vs.* PETER BELL, DANIEL BELL, AND FREDERICK BELL, ADMINISTRATORS OF FREDERICK BELL.—*December* 1848.

A decree of this court remanding a cause, with directions for further proceedings is, as to all questions decided by it, conclusive and obligatory upon this court as well as the court below, and no error can be imputed to the county court in its subsequent proceedings conforming thereto, when such proceedings are reviewed on a second appeal to this court.

APPEAL from the Equity Side of *Washington* county court.

The proceedings upon the first appeal in this case are reported in 2 *Gill*, 163, *Bell, et al., vs. Webb and Mong*. On that appeal this court, on the 26th of February 1845, passed a decree, reversing the decree of the court below dismissing the bill, and decreeing the sale of the land described in the deed, from *Daniel Berger* to *William Hebb* and *Peter Mong*, of the 27th of July 1820, and directing "an account to be taken between the complainants and said *Mong*, of and concerning the estate adjudged to be sold, as aforesaid, in which the said *Peter Mong* shall be charged with such proceeds, and credited with all moneys paid and applied by him to the purposes of the trust, created by the deed of 27th of July 1820, and for which he has not been reimbursed by other portions of the said trust estate, and also for all necessary expenditures upon the land so decreed to be sold for permanent improvements thereon, over and above the rents and profits of the said land, and that any balance due upon such accounting, shall be applied to the

purposes of the said deed of trust of the 27th of July 1820," and remanding the cause.

In obedience to this decree, the land was sold by a trustee, duly appointed by *Washington* county court, and the appellant became the purchaser thereof, at $6252.50. This sale being duly ratified and confirmed, said county court, on the 29th of July 1845, passed an order referring the cause to the auditor, to state an account pursuant to the above decree of the Court of Appeals, with directions to take such testimony in relation thereto as may be adduced by any of the parties in interest. Under this order a large mass of testimony was taken, and the auditor therefrom stated two accounts, in accordance with instructions from the solicitors of the respective parties, and each party excepted to the account stated by the other. The court thereupon passed an order directing the auditor to state an account, charging the defendant, *Mong*, with the rents and profits of the land, from the 1st of April 1822, to the 1st of April 1827, inclusive, at the rate of $150 per annum; and also from the latter date to the 1st of April 1845, at the same rate; also with the sales of land to sundry persons, according to the evidence; also with wood and timber taken from the land, at $10 per acre; also with moneys received by him for the condemnation of land for roads, &c., and crediting him with $1500, paid to *Boyd* on account of the land, $2200 for cost of dwelling house built by him on the land, and various other sums for other improvements, with interest thereon from the time said expenditures were made. To the account stated in pursuance of these directions, the defendant, *Mong*, excepted, and from the order of said court overruling his said exceptions, and ratifying the account of the auditor, he appealed to this court.

The cause was argued before Dorsey, C. J., Spence, Martin and Frick, J.

By Price for the appellant, and
By Spencer for the appellee.

DORSEY, C. J., delivered the opinion of this court.

The decree of this court, (on the former trial of this case,) bearing date on the 20th day of February 1845, on all questions decided by it, was obligatory on the county court, in its proceedings subsequently had, and, in conforming to such decree, no error can be imputed to it, when its proceedings are reviewed on the second appeal to this court. After a careful examination and consideration of all the facts and circumstances in the cause, this court have caused the auditor of the court of chancery to state an account, according to its views, of what *Mong* ought to have been charged and credited with under the proceedings of the county court, from which the present appeal has been taken. We have differed with it as to the mode in which interest is to be calculated, and enhanced the amount of some of the credits, and added some new items thereto, and rejected some of the debits adopted by the county court, all which will fully appear by the respective auditor's statements, confirmed by this and that court. An uniform rent has been charged to *Mong*, during the time it has been satisfactorily proved that he received the same or occupied the land in dispute, irrespective of his improvements, and consequently he has been allowed no interest on his expenditures for improvements, which expenditures have been allowed to him, according to the express directions of the former decree of this court, which is conclusive upon us. The charge for wood against *Mong* is wholly rejected, there being no evidence that he ever sold or improperly disposed of it, and, as he believed himself the rightful owner of the land, it is not to be assumed, without clear proof, that he has wantonly or wilfully wasted or destroyed it, no such proof is disclosed by the record.

This court will sign a decree, reversing the decree of the county court, with costs, and ratifying and confirming the statement made by the auditor, in pursuance to its directions, and decreeing, that out of the proceeds of sale, now or hereafter to be in the hands of the trustees, there be paid to the complainants the sum of $1775.58, being the principal and interest of the mortgage debt due to them, up to the 13th day of September 1845. The sum of $1334.85, shall be forth-

with paid by the said trustees to the appellees, and be deducted from the said mortgage debt and interest, as a payment made on the 13th of September 1845, and the balance of said mortgage debt, amounting to the sum of $440.73, shall be paid by said trustees to the appellees, with interest thereon, until the said trustees may have received, or shall receive, as the case may be, a sufficiency of the amount of sales for the payment thereof, and this cause will, by the decree of this court, be remanded to the county court, that the principles of this decree may be carried into effect, and that such further proceedings may be had therein, as the nature of the case may require.

DECREE REVERSED AND CAUSE REMANDED.

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## Vincent K. Copes, Adm'r of John G. Copes, *vs.* Obed Pearce, and Elilabeth, his wife.—*December* 1848.

In cases of pedigree, the declarations of a deceased person, and of the deceased members of the family, are admissible to prove, *per se*, not only the issue, but the marriage, and the rule of evidence admitting such declaration, is not subject to the qualification, that cohabitation must be first shown to raise the inference of marriage.

It is upon the ground of necessity that these declarations are admitted, as an exception to the general rule excluding hearsay evidence, cases of pedigree being often incapable of proof, and depending entirely upon reputation.

The term "pedigree," embraces not only descent and relationship, but also the facts of births, marriages and deaths, and the times when these events happen.

Cohabitation *alone*, proved between parties, as man and wife, is sufficient to raise the presumption of legal marriage, when the parties have been long dead, and any declarations made by them, as to their being or not being married, may be used to strengthen or weaken this presumption.

Appeal from the Orphans court of *Baltimore* county.

The appellees filed their petition in the orphans court of *Baltimore* county, on the 23rd of February 1846, alleging, that the appellant, as administrator of the estate of *John G. Copes*, deceased, had settled up said estate, and on the 17th of February 1846, had rendered to said court an account, whereby it appears that there remains in his hands, due said estate, the

sum of $2085; and alleges, that said *Elizabeth* is one of the distributees of said estate, and is entitled to one-fifth thereof, as an heir at law of the intestate, and prays that said administrator be required to make a legal distribution of the money aforesaid.

This petition the appellant answered, on the 26th of the same month, admitting that he had rendered an account of his administration, to which he refers for the particulars thereof. "But this defendant, (not admitting that said *Elizabeth* is entitled to claim as a next of kin and distributee of said *John G. Copes*, but leaving her to prove that she is such next of kin, and entitled, as distributee, of any distributable estate that may hereafter appear of said deceased as distributable,) avers, that the balance of said account, as rendered by him, is not claimable by any distributees of the deceased, inasmuch as respondent is a creditor of the deceased to an amount, exclusive of interest, of at least $1400, which claim he insists is to be satisfied out of said balance."

The claim of the administrator, the principal items of which are stated in the opinion, was then filed, and a mass of testimony taken, of which, all that is material to the case is also extracted and set out in full in the opinion of this court, delivered by his honor, *Judge Frick*.

The court below, on the 18th of August 1847, passed a decree, rejecting and disallowing the claim of the administrator, and ordering him to proceed to make distribution of the estate of his intestate, remaining in his hands at the rendition of his last account, among the parties entitled thereto. From this decree the present appeal was taken.

The cause was argued before Dorsey, C. J., Spence, Martin and Frick, J.

By Charles F. Mayer for the appellant, who, upon the question of the relationship of *Mrs. Pearce* to the intestate, (the only point in the case involving questions of law,) insisted, that the appellees have not proved that *Elizabeth Pearce* is a next of kin of the intestate, and entitled to a distributive share of the estate.

The appellee, *Mrs. Pearce*, claims here as a sister of the half-blood to the intestate, by a marriage of *Giles Copes*, the father, prior to that of which the intestate and the appellant were the issue. No testimony, whatsoever, of such prior marriage is furnished; and the only reliance for showing that, is the declaration of *Giles Copes*, as well as to show, that *Mrs. Pearce* was his daughter, and of that first marriage. No co-habitation is shewn to raise inference of marriage, nor even the reputation of marriage; nor that *Mrs. Pearce* was the reputed daughter of that marriage. It will be difficult to present any case, I think, (particularly where the facts are not ancient,) *Starkie*, 1101; 3 *Marsh.*, 3; where declarations of a party have been received to prove identity and legitimacy of issue, without some preliminary proof by co-habitation, or by some facts apart from the declarations, of *a marriage*, to which to refer the issue. As to marriage, (the basis first to be laid,) these declarations are received as testimony only corroborative, where, by proved facts, as co-habitation, a presumption of marriage has been raised. *Buller, N. P.*, 294, 112. The *Berkely Peerage* case, which has defined the principle of hearsay for proof of pedigree, (4 *Camp. N. P. R.*, 401,) will not be found to warrant the admission of declarations to prove, *per se*, not only the issue, but a marriage too. There, there was preliminary testimony of the claimant being the reputed son of the party making the declaration, and under whom the estate was claimed by direct inheritance. The only question there was, as to legitimacy of the issue. In that case, too, there had been co-habitation and recognition, after a certain period of the party, as a legitimate issue of the alliance. Here there is no preliminary testimony whatsoever on which to engraft the declaration of *Giles Copes*, not even testimony of *Mrs. Pearce* being the reputed daughter. Further, the claim here is made under the intestate, and not, as in the *Berkely* case, under the person making the declaration. Can one standing in no relation to the right involved, by mere declaration regulate that right, and oust or impair the interest of one, who is, by unquestioned proof, entitled, and as by such proof appears, wholly entitled?

This is a point of important bearing, and the distinction I submit, is, I think, worthy of some reflection.

Attempts are made to shew a recognition of *Mrs. Pearce* as a sister, by the intestate and the appellant, and there is testimony to their calling her habitually, "*Sister Betsy.*" But this argues no positive belief of there being a kindred between them, as such kindly designations prevail between foster-brothers and sisters at times, and between those who have been educated in one family and intimately associated. But whatever force that term, "*Sister Betsy*," may have, it is neutralised by counter-testimony here; one witness saying, that both appellant and intestate always called her *Mrs. Pearce;* and another, that when *Mrs. Pearce* was spoken of as entitled to inherit from him, the intestate scouted the notion, and considered her to have no more claim than the witness, a stranger, herself had. At furthest, however, the testimony as to this designation of her, would only show what these brothers, then very young, were taught, from some source or cause unexplained, to believe as to *Mrs. Pearce*. They must, from the testimony, have been very young when they so called her, as it appears she lived but a short time with them, after the marriage of which these brothers were born; and was herself married. And this designation of her prevailed only while she lived with *Giles Copes*.

We contend, then, that there is no testimony to retrench the admitted right of the appellant, as a next of kin, and to make *Mrs. Pearce* one. There is a moral right here to all these positions, because, as *Mrs. Potee* shows, the intestate wished and expected none but his brothers, *Vincent*, (the appellant,) and *Richard*, to have his estate. And this view of the deceased has the same force, whether dictated by affection, or by his recognising no other rightful kindred than these brothers.

By C. D. Barnitz for the appellees.

The argument of the learned counsel on this point is novel and ingenious. The conclusions, however, are not warranted by law. Vide 1 *Greenl. Ev. S.*, 103, 104, and in *note* 2, where objections against this kind of testimony are most strongly

urged. We have also received an impression different from the counsel's for the appellant, from examining the cases referred to. "The fact that a father, (*Buller N. P.*, 112,) by his testimony, (which is equivalent to declarations under certain circumstances,) is allowed to bastardize his children, after co-habitation is proved, does not show co-habitation the chief requisite in a case of this kind." But we will turn to the testimony. *Mrs. Eleanor Latcham* testifies, that she "often heard *Giles L. Copes* speak of his first wife, as the mother of *Mrs. Pearce*." "Often heard him say, he was married to *Mrs. Pearce's* mother." "He appeared to be very fond of *Mrs. Pearce*. *Vincent Copes* and *Betsy* lived together with *Giles*. After *Mrs. Pearce's* marriage, she visited the family of *Giles Copes*. All treated her kindly, (*John Vincent* and *Richard*,) called her '*sister Betsy*.' They appeared extremely fond of her, and *John* treated her with great respect, as much so as brother could treat a sister," &c. *Mrs. Hale* knew *Giles L. Copes*, the father of *John G. Copes*, for twenty years. "Has often seen *Betsy Pearce* at his house." "She called him father. Has heard him say *Betsy Pearce* was the daughter of his first wife. *Vincent* acted towards her as a brother to a sister." "*Giles* called her children grand-children." *Mrs. Sarah A. Copes* was the last wife of *Giles L. Copes*, whose testimony will tend to diminish the share due her own child. She gives every particular relating to the marriage of *Giles Copes*, in *Virginia*, to the mother of *Mrs. Pearce*, as related by himself; also the birth of *Mrs. P.*, &c. She also speaks of her recognition by the family. *Sarah A. Dorsey*, "*Mrs. Pearce* went to see *John* at different times when he was sick. On the Friday before he died, he asked for her by the name of '*sister Betsy*,' and asked why she had not been there, he always appeared glad to see her. Has heard *Vincent* call her *sister Betsy*." *Mrs. Beamer*, "*Mrs. V. Copes* introduced *Mrs. Pearce* as her sister."

It therefore appears that *Mrs. Pearce* lived with *Giles Copes*, as a daughter, before marriage, was treated and recognised by *Giles* as a daughter, and by *John* and *Vincent* himself, as a sister. That after marriage she visited the family,

and was still treated as a lawful daughter and sister; and her children, as grand-children, by *Giles L. Copes;* and always up to the death of *John,* with the respect due a sister. *Giles* narrates, time and again, the fact of his marriage with the mother of *Mrs. Pearce;* the time of the birth of his children in lawful wedlock; and the fact of *Mrs. Pearce* being the youngest child of his first wife.

The witnesses all agree to these facts.

The minutest particulars being given by the last wife of *Giles L. Copes,* the father of *John* and *Mrs. Pearce.* Thus much for a defence to the insinuations of him who lived in the same house, eat at the same table, and grew up under the care of her, on whom, until assailed by her own brother, the breath of suspicion never rested.

MAYER in reply:

We are inveighed against, because we put *Mrs. Pearce* to proof of her kindred with the deceased. Our legal right to do this is clear; our moral justification I have already indicated, in the proved fact, that the deceased never regarded her as entitled to share his property at his death, and died in the faith, that *Vincent* and another brother, (*Richard,*) would succeed to all he should leave. We believe and insist, that *Mrs. Pearce* is but a foster-sister of the deceased, and has no claim as next of kin. The record made by *Giles Copes,* father of the deceased, in his (*Giles'*) bible, does not note *Mrs. Pearce* as a daughter, nor any marriage prior to that of which the deceased and *Vincent* were the issue. But there is no evidence of any such marriage, of which *Mrs. Pearce* may be esteemed an issue. No testimony by witnesses, to a marriage, nor by co-habitation, is adduced. Declarations, without co-habitation, have never been received as evidence of marriage. They have been admitted to fortify the presumption of marriages from co-habitation, but only in that light and force. *Stark., 4th Pt.,* 224. 3 *Halsted,* 249. *Coxe.,* 593. In no case will it be found, that declarations of a party have, *per se,* sufficed to prove his marriage. Here brothers claim from a brother, and their kindred is undisputed; they do not recur to *Giles*

*Copes* to prove their relationship, by asking of his reported declarations the enumeration of his children. On what principle is his declaration to prove a marriage, and introduce another heir to impair an established claim of admitted kindred? Why is not some testimony of this prior and first marriage adduced? If the ceremony of the marriage could not be substantiated, why not some proof given of co-habitation? The event is not so ancient as to make such testimony impracticable, or not likely to be attained, and hearsay testimony is allowed in matters of pedigree, only from consideration of the necessity of the resort to traditional intelligence, because the facts are too remote to be reached by living testimony. 3 *Marsh*, 326, *Briney vs. Haun*.

We do not, by challenging *Mrs. Pearce's* claim as next of kin, dishonor the memory of *Giles Copes*, the father of the deceased. His designation of her as daughter, proves not that she was in fact his daughter. It may have been a term of affection and not of kindred, 3 *Halsted*, 249; but, at all events, it is not proof of kindred. *Giles* treated *Mrs. Pearce* as a daughter, and that is all that is to be deduced from the testimony. The cases show that declarations, such as are referred to him, have never been available to prove more than age, or time of birth, a marriage being first, actually or presumptively, proved. *Cowp.*, 593. This, too, is not a case strictly of pedigree, where declarations of far-off relations have been admitted, to show early relationship, and where a deduction of kindred was required, from a remote *propositus*. This is the case of a direct derivation of brother from brother. But even in pedigree tracings, marriages are shown by co-habitation, and not left blank, as here, and to be supplied by a declaration.

We insist, that there is no adequate testimony of *Mrs. Pearce's* relation as sister.

Perhaps the vague form of the decree, may not submit this point of kindred for decision, but it is desirable that the court should lay down the principles that bear upon it, so as to preclude doubt and litigation hereafter, under any future action of the orphans court in this case.

FRICK, J., delivered the opinion of this court.

*Pearce* and wife, by their petition to the orphans court of *Baltimore* county, represent, that *Vincent K. Copes*, the administrator of *John G. Copes*, deceased, had settled all debts due to, and from the estate, of which he is the administrator, and that there remained in his hands a large amount for distribution; that in right of the wife, as half-sister of the deceased, they are entitled to a distributive share of said estate, and pray the court to order the administrator to distribute the balance among the parties entitled.

The administrator, (who is a full brother of the deceased,) in answer to the petition, puts the petitioners to proof of *Mrs. Pearce* being next of kin; and further claims a large amount to be due him from the estate, which amount would, in a great degree, exhaust the balance in hand.

The administrator, in the course of his administration, and before the petition was filed in this cause, had presented to the orphans court, for its sanction, the account which is now the subject of controversy, the claims under which may be classed and specified as follows:

1. For money lent, $159.50.

2. For balance due on an alleged partnership, between the intestate and his administrator, as survivor of *John G. Copes & Co.*, and *M. V. K. Copes & Co.*, $883.49.

3. For a balance of wages, as clerk to the intestate in a grocery store, $83.33.

4. For bricks furnished to the deceased, and for a balance due at brick-yard, after the partnership (in making bricks) had ceased, $36.19.

5. For commissions on sales of brick *for* the deceased, and collections upon sales made *by* the deceased himself, subsequent to the partnership, $262.49.

6. For attendance of administrator's wife upon the deceased, $20.

To this account, (amounting to $1445.15,) there is attached the probat, in the usual form, by *Vincent K. Copes*, the creditor; and the probat then further certifies, "that at the same time appeared *James Carney*, and made oath on the holy

evangely, that the *goods, wares,* &c., charged in the matter in the within account, *were sold and delivered,* as charged to *John G. Copes,* and at the prices therein charged."

This is the character of the testimony, upon which the appellant relied in the first instance, before the orphans court, and the account was, of course, rejected.

The claim being thus repelled, the appellant sought to establish the several items of the account, by producing the books of the intestate in evidence, and by other testimony of witnesses, which is too voluminous to permit even an abstract; but having had the careful revision of the court, (separating what is illegal and incompetent from the mass,) we shall recur to, in such particulars, as are requisite and necessary in connection with the opinion here expressed.

The orphans court upon this testimony, disallowed the whole claim of the appellant, rejecting every item, and directed the administrator, (the appellant,) to make distribution of the estate of his intestate, remaining in his hands, among the parties entitled thereto, and from this order the present appeal is taken.

The claim upon the alleged partnership accounts, although not the first in order, seems to be the first in importance and amount. The parties were both brick makers in the city of *Baltimore*, and the operations of the intestate were carried on in two distinct brick-yards, between the years 1836 and 1840, until abandoned for a time in the latter year, when the intestate became engaged in the grocery business, from which the appellant deduces another claim for hire and service as clerk. It may be gathered from the testimony, that a partnership of some sort subsisted between the parties, by the declarations of the intestate, made to several of the witnesses. But when it commenced, during what period it was to continue, whether it related to one or both of the brick-yards, or what were its terms, are left uncertain. No particular period is assigned to this partnership by any witness. The declarations of the intestate produced in evidence, were in 1837, '38 and '39. The appellant himself has located it between the 6th of April 1838, and the 27th of February 1839, and upon this assumption an account has been stated between the parties, by *Stephen Lawson*, an

accountant, who says in his deposition, that the appellant "came to witness with the books, and stated that he was the surviving partner of his brother, *John G. Copes*, and he wished him to state an account from the books between the parties, taking this statement of the commencement and the termination of the partnership." Upon this statement of the appellant, that he was the surviving partner, not from the evidence on the books of its limitation, or of any terms of partnership, *Lawson* states this account. It is to be observed here, that these books produced to *Lawson*, are the private account books of the intestate, all the entries being in his own handwriting, not the slightest trace of any partnership account can be found in them, but the heading on two consecutive pages of one of the books, thus: "*John G. Copes & Co.*," and "*Major V. Copes & Co.*," in which some insignificant items of cash are charged, to the one $72, to the other $44, for the space of the three first months in 1839, and there, without any credits on either side, or without further trace of these accounts, they close. It is part of the appellant's statement to *Lawson*, that he was the surviving partner of *both of these* firms; and to support his claim for an account, within the period designated by himself, all the private accounts, books, of the intestate are produced and invoked to his aid, and the result of the accountant's labor is, that the sum before mentioned is generally due to the appellant, *without distinguishing between the two firms*, or what amount on each. To arrive at these results, *Lawson* says, for instance, that "he was regulated by the brick-yard account, by the sales shewn there of bricks by the deceased, and paid for to him." This "brick-yard account," purports to be the sales by the intestate, running continuously from June 1835 to January 1839, without interruption, or a sign or memorandum of a partnership sale. They are all ostensibly on the intestate's own account, and the extract from these sales to be carried to the partnership credit, for the period assigned to the partnership, has nothing to rest upon but the instructions given by the appellant to *Lawson*.

The books produced are six in number. There is no evidence that they are the books of a partnership. On the con-

trary, other witnesses discountenance the pretension. The intestate, it is proved, had two brick-yards. They may be the books of a *separate* concern. Another accountant, *Prettyman*, who was called to examine them, says, "that he sees nothing in the books to indicate a partnership;" and *Caton*, the witness first brought to explain the books, says, "he could, in any case, *only* make out an account so far as the books go." "There might have been prior and subsequent transactions not in the books." That they contained no satisfactory evidence of a partnership, or of partnership accounts, is conclusive from the testimony of *Lawson*, an accomplished accountant, that the appellant "answered such questions as he put to him," and that he took *his* statement as to his being surviving partner, and as to the period within which the partnership was limited. In all this, the evidence to sustain the partnership by the books is, so far, totally deficient.

To support the first items in appellant's account for moneys loaned, the intestate's cash book is produced shewing the entries to that effect. It is rather singular that there should be an hiatus in this cash account from April 1838, to April 1839, the very period assigned for the partnership, and *that it is manifestly produced by the abstraction of one or more leaves from the book*. The debits include the sums of $100, and $28, as borrowed from the appellant, and charged now as the first items in his present account; and the whole debits on the page added up, are said to be "carried over"—no credits appear after the 16th of April '38, and the continuation of the account, no where appears. *Peyton Rose* a bookbinder, to whom the book is shewn, "concludes that the book is not perfect, and thinks from the appearance at that place, that the sheet has been taken out, because that section shews it has not as many sheets as the other; without counting it, when the book is closed." But another new book of similar form and dimension, just purchased from a book-store, is produced, by *Henry Bachler*, a witness for the occasion, and is found to have the same precise defect; and is of course used to repel the guilty presumption as regards the other. We think it unsatisfactory from *Bachler's* own account of his agency in the

matter. "He was requested by *Vincent Copes*, to buy a book of that size;" and was not told why he was to buy the book. He went into the store and asked for a book of the size, and got this. Expects *Vincent Copes* will pay witness for his outlay for the book, as he asked him to buy it. We forbear comment upon this clumsy attempt to allay suspicion. For still the testimony of *Rose* remains, and the conclusive indications from which he points out the abstraction of the leaves. Besides this the balance of account was to be "carried over," from the former page. Whereto? is significantly asked by the counsel for the appellees. It does not appear; and without this continuation of the account, is it to be presumed in favor of the appellant, that the intestate is entitled to no credits? How was the court to proceed, without the deficient leaves of the cash book? That book purports to be an account of the entire cash transactions of the intestate. From that account the appellant extracts the proof of part of the charges made in his account. The credits after the 16th of April '38, disappear with the abstracted leaves. Not by the agency of the intestate; because he could have no inducement to destroy testimony going to discharge his own liability; the credit side of his account. The inducement lay the other way; in the way of the appellant, who was in possession of the books, and whose interest it was, that the credits, if any, should not appear. This court cannot say, that the hiatus in the cash account if filled up, might not afford an answer to all the claims of the appellant, up to the period of its resumption, April 20th 1839; particularly as it covers most of the time *selected* by the appellant as the period of the partnership. The books produced are otherwise effaced and mutilated, and even if the erasures do not bear upon the present enquiry, of which we cannot judge, yet, the glaring deficiency in the cash book, and the unsuccessful attempt to account for it, throws a suspicion upon the whole claim; which is not weakened by the original form of probat in which the account was first brought to the notice of the Orphan's court. It will be remembered, that *James Carney* was there produced by the appellant, who made oath "that the goods and wares charged in the account were sold and deliv-

ered at the prices therein charged," and this gross perversion is presented to the court by the appellant, as evidence that his claim is "just and true," when not a single article of merchandize is the subject of that account. Upon being afterwards examined, *Carney* testifies, "that having been an apprentice of the intestate in the year 1838, he was called upon by *Vincent Copes*, to go before the magistrate, to testify to the partnership, of which he had heard intestate speak in his lifetime; that he thought he was asked with reference to this fact of partnership only; but that he knows nothing about the books or business of the partnership, and does *not know whether one was indebted to the other*.." This was certainly an inauspicious commencement of the proof, the sequel of which is here developed.

An examination of *Larson's* account, further discloses, that the appellant does not appear to have paid anything into the concern; and proceeds upon the assumption, that *John wound up the business*, and received all the money of the firm. And yet, this is distinctly negatived by a witness of the appellant, *Joseph Sanks*. He says "he became acquainted with *John Copes* in 1840, when he bought out *Gordon's* grocery store. *Vincent* was then settling up the business of *John's* brick-yard. *John* then stated that *Vincent* was in partnership with him in the brick business, *and was then settling it up*."

Here then the onus is on the appellant in 1840, at the close of the partnership; and we may presume safely that it was not permitted to remain unsettled until the death of the partner, with such a balance as is claimed by the appellant in his favor; particularly as we find him afterwards, (as is inferred from the subsequent charges in his account,) acting in different subordinate relations to the intestate, as his clerk at one time, and as his salesman and collector at another.

And further to sustain this conclusion, that these and other matters of account were settled between the brothers, before the death of *John*, we have the concurrent declarations of both parties in confirmation of it. *Samuel Harner* says, that the intestate told him about a year before his death, "that he did not owe a dollar in the world," that "he did his business accord-

ing to his means." And to *Dorsey*, a few weeks before his death he said, "that he did not owe $10, except his doctor's bill." In connection with this, we take the declarations of the appellant to *Reese*, "that a day or two before a public sale of some of intestate's property, he had a conversation with appellant about settling up the intestate's estate; and appellant said he would have very little to pay for the debts of his brother; that he was not indebted over $100; that there were some small balances on the books in *his* favor, but the whole indebtedness would not amount to $100." And a closer examination of these books confirms this statement. In I. C., No. 3., is to be found an account opened in favor of appellant for "night-watching," in 1842, amounting to $107, at $1.25 per night, on which a small balance still appears due. In April 1843, in the same book, there is a credit to the appellant of $3.34, for three days; and in J. C., No. 1., there is a further credit to him, in 1843, of $66 and some cents, for 60 days service at $1,11, on which account a small balance remains in his favor. And these may well comport with the appellant's declarations to *Reese*, before the idea occurred to him, of reviving the partnership, with the settlement of which he had been charged in 1840; while at the same time they are utterly irreconcilable with the pretension, that the intestate could be indebted to his brother in an amount so large as this account proposes, and yet be struggling in his service by day's work, and night-watchings, at periods subsequent to this alleged claim, for about one dollar, each day.

The whole pretence is at variance with any theory that can be set up in the appellant's favor by a resort to the books of the intestate, as we find them; and is, in our opinion equally fatal to his subsequent charges in the account for commissions on sales and collections. That he was also in the employ of the intestate, some time in 1844, is in evidence. In what character only appears from the testimony of the several persons named in his account, to whom he either sold and delivered bricks, or collected the amount when sold by *John;* and upon which the commissions are charged that make up the residue of his claim against the estate. One item, selected

from the rest, will serve to shew the character of these claims, and in the opinion of the court is decisive of the whole.

On the 28th December 1844, the balance of the stock of bricks (121,225) is sold to *Phillips;* and we take his account of it as we find it in the evidence. "He first made a proposition to *John Copes* (the intestate,) for a purchase of all the bricks then in the yard. The proposition was not accepted. Then made a second proposition to him in presence of *Vincent*. This was accepted by both parties. At this time *Vincent* was attending more or less to *John's* business, and it was understood he was to count the bricks as *John* was unable to attend to the business of the yard from sickness. He always considered himself dealing with *John Copes*. The bricks were counted by witness and *Vincent*, in one day, as he thinks, from 10 A. M., to 3 or 4 P. M. The counting he considered the delivery." For this day's work we have the charge in this account of 10 per cent commission, being $92.55, and 25 cents per thousand for the delivery, $30.30, making together the sum of $122.85; and the rate and charge of commission is the same upon the remaining items; while the previous work done in the employ of his brother, and settled in his lifetime, appears to have been at the rate of $1.11 per day. In the cases of sales to *Allwine*, *Phoebus* and others, from an examination of their testimony, the bargain and purchase appears to be made from intestate, occasionly with, and at other times without, the agency of *Vincent*. In recurring further to the sale's book of the deceased, it will be seen that the accounts of *Kenny*, *Jenkins*, *Sisco*, and so on, upon which the commissions for collections are charged in this account of appellant's, are all marked, "closed by the deceased." How closed, and for what purposes, we are left to infer. It is of course an entry after the death; and not a word of explanation is offered to shew by whom; except from the fact that the books are produced by the administrator, (the appellant.) The very first account in the sales book, page 1, is an account with Major "*T. Copes*," in which may be found the credit of bricks proved to have been furnished by him for the intestate, *while he stands charged with others to counterbalance this item*. Then follow the accounts said to

be "closed by deceased;" but *this account*, at the bottom, has evidently had some explanation or memorandum, which is now *totally erased and illegible*. Whether closed or not, cannot appear; and although it involves only a small portion of the account, (the sale or exchange of bricks on his own account,) how are the court to dispose of it? How can they say, that books thus mutilated, are reliable testimony for any purpose in a court of justice? Not a paper, or a single voucher produced by the appellant, in support of the claim which he would extract from them. He proves by oral testimony, the receipt of the intestate's money, and the books are referred to for the proof of its being paid over. Not one word however, is found in them of his agency or commissions. And if such agency existed, nothing to repel the presumption that the commissions were paid, or retained, as usual, in accounting for the collections. All is referred to these books. And with the manifest evidence, from actual inspection, that they have been revised since the death of the intestate; with no satisfactory explanation of the subsequent mutilations; we cannot impugn the judgment of the court below, that rejected them altogether. Without expressing any other doubts or suspicions than are conveyed by the decision itself, we feel bound to affirm the order and decree of that court, disallowing the whole claim of the appellant, and directing him to proceed to distribution, among the parties entitled.

The next question is, whether the said appellees, in right of *Elizabeth* the wife, are entitled to share in the distribution of the estate? She claims to be the half-sister of the intestate, by a former marriage of *Giles L. Copes*, the father, and by the answer of defendant, not admitting or denying it, is put upon the proof of the fact. *Sarah A. Copes*, the last wife and widow of *Giles* is produced, and says: "That she often heard *Giles* speak of being married to *Mrs. Pearce's* mother, as his first wife, and of the children of that marriage, of whom *Betsy* was the youngest of three; and that he was married in *Accomac* county, *Virginia*. That his first wife died, after three or four years, and he married the second, with whom he lived between twenty and thirty years;" and she speaks of her-

self as the third. "*Giles* always called *Betsy Pearce* his daughter, always spoke of her as his daughter, and called her children, his grand-children." Other witnesses speak to the same, or similar declarations, by *Giles*, "that *Betsy* was the offspring of his first marriage, that she lived with *Giles* as his daughter before her marriage; and that all the brothers by the second marriage called her '*sister Betsy*,' and treated and recognized her as a sister."

Some evidence was produced designed to weaken the force of these declarations, by giving to *Mrs. Pearce* the relation of foster-child and sister, in the family. But it is purely argumentative, and in no view can be considered as impeaching, contradicting, or weakening, the testimony of the other witnesses.

At first view we should have held these declarations as amply sufficient to establish the legitimacy of the claim of *Elizabeth Pearce*, but that it is strenuously insisted by counsel: "that co-habitation must be first shown, to raise the inference of marriage; and that the authorities do not sanction the admission of declarations to prove, *per se*, not only the issue, but the marriage." We have examined the cases cited for this doctrine, and can come to no such conclusion. *Buller's N. P.*, 294, 112. 4 *Camp. N. P. C.*, 401. *Cowper*, 593. Co-habitation alone, proved between parties as man and wife, is sufficient to raise the presumption of legal marriage, when the parties have been long dead. 2 *Ph. Ev.*, 286. It may not be possible, from the nature of the case, to supply additional proof. If there are any declarations of the parties besides, as to their being or not being married, these are afterwards to be used, to strengthen or weaken the presumption arising from their co-habitation. This is the meaning conveyed by *Buller* and by *Philips*. The claim of legitimacy will be found to be based upon co-habitation, as the first proof offered, not the first required. *See* the case in *Buller N. P.*, page 112, and *Wilson vs. Mitchell*, 3 *Camp.*, 393; *coverture being the defence set up in the case* And the *Berkeley* peerage, case warrants no such doctrine, as it was cited to sustain. *Lord Mansfield*, (page 415,) expressly says: "In matters of pedigree, it being

impossible to prove by living witnesses, the relationship of past generations, the declarations of deceased members of the family are admitted; from the necessity of the thing, the hearsay of the family as to marriage, births, and the like, are admitted." And he adds more, "that if the father is proved to have brought up the party as his legitimate child, this amounts to a daily assertion that the son is legitimate." Here is authority sufficient to sustain the pretensions of *Mrs. Pearce.* Any other, would in fact be to repudiate the rule which admits these declarations, as the best, and in some cases, the only evidence, the nature of the case admits of. It is upon this ground of necessity, that they are admitted as an exception to the general rule in relation to hearsay evidence; cases of pedigree being often incapable of direct proof, and depending entirely upon reputation.

The rule which emphatically embraces this case, is distinctly laid down in all the elementary writers on evidence, without any such qualification as is contended for.

"The declarations of a deceased person, as to the fact of his marriage, or to prove that a child was born before or after marriage, are admissible in evidence on a question of pedigree;" and even "the declarations of deceased members of the family, whether relations or connections by marriage, are admissible evidence to prove relationships, deaths or marriages." 2 *Ph. Ev.*, 284, 287. "The term pedigree embraces, not only descent and relationship, but also the facts of birth, marriages and death, and the times when these events happen." *Greenl. Ev.*, 117.—*See*, also, page 116. And it is therefore clear, that these authorities fully sanction the admission of the declarations of the answer, to prove, *per se*, not only the issue but the marriage.

The declarations of *Giles Copes* are full and explicit, with regard to his marriage, and the birth of *Elizabeth*, the appellee; and his whole subsequent conduct, and the course and bearing of the brothers, is an entire corroboration of them. Nothing short of actual proof of marriage and birth, by witnesses actually present, could be more convincing and conclusive; and we therefore affirm the right of the appellees to a distributive share of the personal estate of the intestate.

The necessity of a thorough examination of the voluminous testimony, has extended the opinion in this case, beyond the limits we desired to prescribe to ourselves. We confine ourselves, therefore, to a single remark, upon the influence sought to be produced upon the decision of the court by the production of the bible of *Giles Copes*, omitting in the family record the names of his children by this alleged first marriage, while it records the second, and the issue derived from that union. It has been satisfactorily proved by *Sarah*, his widow, that there was in the family of *Giles*, another bible, which is in the possession of the appellant; and this, of itself, might suffice to negative the inference, for which only the *one* is introduced. But this intended negative pregnant, cannot be brought to weigh against the repeated, unimpeached declarations in evidence, in the affirmative. What the bible contains is evidence of his declarations, as if written in any other book, or upon any other piece of paper. What it does not contain, cannot be used by inference, to falsify his uniform declarations on other occasions. If the proof were doubtful, or defective, the inference here sought might have some weight. But to give it any importance, under the existing state of the proof, would be to denounce all that *Giles Copes* has declared; and reject the competent and sufficient evidence that establishes the right of the appellees, to claim in this cause. The decree of the court below, is therefore affirmed.

DECREE AFFIRMED.

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WARFORD MANN, EX'R OF JOHN H. MANN, *vs.* GEORGE W. HIGGINS AND JOHN MILLER.—*December* 1848.

The lien which partners have upon the partnership property, to enforce its application to the payment of the partnership debts, attaches to all their joint property, but relates no further. Partners, as such, have no other equities in relation to the separate property of each other, than separate creditors.

The executor of *J M* filed a bill in equity, alleging, that a partnership had existed between his testator and the defendant *H*, and praying for an ac-

count of the partnership transactions, and that a certain fund in the hands of a trustee, to which *H* was entitled in right of his wife, the same being her distributive share of her deceased father's real estate, might be enjoined and set apart for the payment of his claim. HELD:

That the complainant had no lien, or claim in equity, on this fund, different from any other creditor of *H*, and that the injunction was rightly dissolved, and the bill properly dismissed.

A court of equity will not aid even the husband, to reduce the *choses in action* of the wife, into possession, except upon terms which provide for the support of the wife and her children; much less, then, will it exert its power to effect the application of such *choses in action*, to the payment of the husband's creditors: and thus deprive the wife, surviving her husband, of the right given her at law, of being reinvested with all the *choses in action* not reduced into possession by the husband, during coverture.

APPEAL from the Equity side of *Washington* county court.

The bill in this case was filed by the appellant against the appellees, on the 8th of May 1845; the allegations of which, with those of the answer, are fully stated in the opinion of this court.

The injunction prayed by the bill, was granted on the 28th of the same month. And after the coming in of the answers, a commission was issued, under which testimony was taken; the effect of which is sufficiently stated in the opinion. The cause, then, being set down for hearing, the court, (BUCHANAN, A. J.,) on the 15th of February 1847, passed a decree, dissolving the injunction and dismissing the bill; from which the complainant appealed to this court.

The cause was argued before DORSEY, C. J., SPENCE, and FRICK, J.

BY J. SPENCER, for the appellant, and
BY J. DIXON ROMAN, for the appellees.

SPENCE, J., delivered the opinion of this court.

We have carefully examined the record in this cause, to discover the complainant's equity.

The bill charges, that a partnership was entered into between the complainant's testator and *George W. Higgins*, in the year 1837, which continued until the year 1840; that said *Higgins* became indebted to the firm in a large sum of money

which he had not paid or accounted for. The bill further charges, that said *Higgins* is entitled to a distributive share of the proceeds of the real estate of a certain *Peter Miller*, late of *Washington* county, deceased; that *John Miller*, of *Peter*, of *Washington* county, the trustee for the sale of said real estate, held in his hands funds arising from the sale of a portion of said estate, a part of which had been distributed, and was payable to said *Higgins*, as appeared by an account stated by the order of *Washington* county court, as shewn by complainant's exhibit B, which is made a part of complainant's bill. The bill further charges, that said *Higgins* is a non-resident of the State of *Maryland*. The prayer of the bill is, that an account may be taken of the partnership dealings and transactions; that *Miller*, the trustee, may be enjoined, and restrained from paying the money in his hands distributed to said *Higgins*, or which may come to his hands, to said *Higgins*, or to any other person, until the final decision of this cause.

The defendant, in his answer, denies any and all indebtedness to the firm, and avers that, in the month of May 1840, the partnership was dissolved by mutual consent; and that the defendant was the owner of one undivided half-part of all the partnership property; that on said dissolution they settled the accounts of the firm, when the defendant, *Higgins*, was found to be indebted about three hundred dollars: which was about, or near, the estimated value of his interest in the partnership stock. That it was then and there agreed, that said *Mann* should accept the defendant's interest in said property, in full satisfaction of said balance; and accordingly, said *Mann* retained the possession and control of all said property for said purpose, so as aforesaid agreed between them.

The answer of the defendant admits that he is entitled, in right of his wife *Sarah*, who was the daughter of *Peter Miller*, to a distributive share of the proceeds of the real estate of *Peter Miller*, deceased, in the hands of *John Miller*, the trustee for the sale thereof.

If the proof of the dissolution of the partnership, and the agreement and settlement of the concern is not conclusive,

(which we think is,) there is nothing in the record which raises an equity to entitle the complainant to the writ of injunction.

The property, debts and effects of a partnership are the joint property of the partners, and as an incident to that joint property, the partners have a lien thereon, from which their equity arises, to enforce the application of such joint property to the payment of the partnership debts. This equity attaches to all their joint property, but relates no further. Partners, as such, have no other or different equities, in relation to the separate property of each other, than other individuals, or separate creditors. Helpless, indeed, would be the condition of separate creditors, if it were otherwise.

The bill in this case prayed, that *Miller*, the trustee, should be enjoined from paying over to *Higgins*, his wife's distributive share of her deceased father's real estate, until an account could be taken of the partnership transactions; and then, that it might be decreed applicable to the payment of that account.

Courts of equity do not lend their aid, even to husbands, to enable them to reduce the *choses in action* of their wives, into possession; unless upon terms which provide for the maintenance and support of wives and their children. Surely then, they will not exert their power to effect the application of the *choses in action* of wives, to the payment of the creditors of their husbands; thus depriving wives surviving their husbands, of the right given them at law, of being reinvested with all their *choses in action*, not reduced into possession by their husbands during their coverture. This case does not present the semblance of an equity. What lien, or claim in equity, had the testator, or has his executor, this complainant, on this fund, or distributive share of *Higgin's* wife, in the hands of the trustee, to entitle him to have it enjoined or set apart for the payment of his debt, other, or different, from that of any other creditor of *Higgins*? We can conceive of none. The answer charges, and the evidence proves, that upon the dissolution of the partnership in 1840, the partnership transactions were settled, and that *Mann* accepted *Higgin's* share of the partnership property, which was sold by the complainants as executors of *John H. Mann*, which had been accepted

in satisfaction of the balance ascertained to be due from *Higgins* to *Mann*, the testator, on the settlement aforesaid.

This court are therefore of opinion, that there is no error in the decree in this case; and that the injunction was dissolved, and bill properly dismissed.

DECREE AFFIRMED, WITH COSTS.

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REVERDY JOHNSON *vs.* EDWARD H. DORSEY.—*Dec'r* 1848.

Where a decree required the trustees to give "at least three weeks previous notice, inserted in some newspaper or papers, and such other notice as they might think proper, of the time, place, manner and terms of sale:" HELD, that an advertisement of this sale, inserted once a week for three weeks, and once on the day of sale, in two daily newspapers, was sufficient notice, and that the trustees were not bound to advertise the property daily for three weeks previous to the sale.

A sale regularly conducted, and fairly made under the authority of a court of chancery, where a third party, a stranger to the proceedings, becomes the purchaser, cannot be disturbed on the ground of *mistake*, unless such mistake has been caused by the conduct of the purchaser, or can be traced to the creditor, for whose use the property was sold, or to the trustee.

Where there was a general impression in the community that the sale would be postponed, and this was known to the exceptant, it was his duty to communicate the fact to the trustees, and his failure to do so, would present an insuperable obstacle to the interposition of a court of equity, in his favor, to set aside the sale.

The *English* practice of opening biddings, as a matter of course, before the ratification of the master's report, has not been adopted in *Maryland*, and it is not expedient to introduce it.

The land in this case sold for $12,422.25. HELD, that the court would not be authorised to vacate the sale upon the single ground of inadequacy of price, even assuming the property to be worth $20,000; the estimate placed upon it by the exceptant.

Inadequacy of price, standing by itself, is not sufficient to vacate a sale, unless it be so gross and inordinate, as to indicate some mistake or unfairness in the sale, for which the purchaser is responsible, or misconduct or fraud in the trustee.

APPEAL from the Court of Chancery.

Upon a bill filed by the *Neptune Insurance Company*, of *Baltimore*, the chancellor, on the 18th of May 1843, with the

consent of parties, passed a decree for the sale of certain real estate of one *Rebecca Dorsey*, situated in *Baltimore* county, for payment of a mortgage debt due the complainants. *David Stewart* and *Charles F. Mayer, Esqs.*, were appointed trustees to effect this sale, and the decree directed them to "proceed to make sale of the mortgaged property, having first given at least three weeks previous notice, inserted in some newspaper or papers, and such other notice as they may think proper, of the time, place, manner and terms of sale, which terms shall be," &c.; prescribing the usual terms, one-fourth cash, and the balance in equal instalments, at six, nine and twelve months.

This decree was afterwards entered for the use of the *Baltimore Life Insurance Company*.

On the 21st of April 1847, the trustees filed their report of sale, in which they state, that after due notice by advertisement in daily newspapers of the city of *Baltimore*, they offered the property for sale on the 15th of April 1847. That *Reverdy Johnson*, by the bid of *John S. Gittings*, became the purchaser, at the price of $40 per acre, making for the whole purchase money the sum of $12,422.25. That they had twice before advertised the said real estate for sale, and, on both occasions, the sales, on or shortly before the days appointed, were, at request of *Edward H. Dorsey*, interested in the estate in place of said *Rebecca Dorsey*, deferred; the sale last stopped being one appointed for the 15th of October 1846. The usual oath of the trustees was annexed, that the sale was fairly and *bona fide* made.

With this report was filed, as exhibits, an advertisement of sale, describing the property, &c., proved to have been published once a week for three weeks, prior to the sale and on the day of sale, in two daily newspapers of the city of *Baltimore*.

Also two letters, dated the 15th of October 1846, directed to the trustees, the one from *Edward H. Dorsey*, in which he says, "the sale advertised by you, as trustee, being postponed from this day, at my request, the commissions and expenses are to be paid, as in case of a sale;" the other from *John J. Donaldson*, the president of the *Baltimore Life Insurance*

*Company*, for whose use the decree had been entered, requesting a postponement of the sale until further notice.

On the same day, (21st of April 1847,) the usual order of ratification *nisi* was passed by the chancellor; and on the 21st of June following, being the day on which the sale stood for final confirmation, objections were filed to its ratification by *Edward H. Dorsey*, who alleged himself to be the owner of the equity of redemption in the property sold under the decree: 1st. Because the price for which the same was sold is grossly inadequate, said property being fully worth $20,000. 2nd. Because proper and reasonable notice of said sale was not given. 3rd. Because there was no attendance of bidders at said sale, and no competition, in consequence of which said property sold far below its value, as stated in the first exception. 4th. Because various persons, who were anxious to purchase said property, and would have given, and would now give, a much larger price for the same, (one of whom, *J. McHenry Boyd, Esq.*, a responsible person, would have given, and would now give, from $18,000 to $20,000,) were prevented from attending said sale by some mistake or misunderstanding in relation thereto, by reason whereof said property was sold far beneath its value.

On the 24th of the same month, his honor, *Nicholas Brewer*, an associate judge of the third judicial district, to whom the proceedings had been certified by the chancellor, (*Johnson*,) passed an order finally ratifying and confirming the sale, after stating that the paper filed by *Edward H. Dorsey*, objecting to the sale, was signed by him, but that there was no affidavit by him or any other person, of any of the facts therein stated, nor any order asked for to take testimony to prove them.

On the 3rd of July following, a petition in due form was filed by said *Dorsey*, re-asserting substantially the same objections to the sale, and more at large, alleging, "that from want of proper and sufficient notice by advertisement, and from the impression getting abroad that said land was not to be sold, persons were prevented from attending or from bidding at said sale, who would have given from $18,000 to $20,000 for said land. That said trustees only advertised said sale once a week

for three weeks, and once on the day of sale, in two daily newspapers in the city of *Baltimore*. That *James McHenry Boyd, Esq.*, a gentleman of large fortune, was desirous to become the purchaser, and would have given more than $18,000 for said property, but he had heard that the same would not be sold, and to satisfy himself of the fact, looked at one of the numbers of the paper in which the sale was advertised, and not finding the advertisement, supposed the same was withdrawn, and that the sale would not take place, and therefore did not attend the same. That *Stephen Thompson, Esq.*, of *Baltimore* city, was present at the sale for the purpose of bidding, but believing that there was but one person bidding, and that said land was being bid in for the benefit of your petitioner, did not bid for the same, but has declared said land ought to have brought, at least, from $60 to $75 per acre, and he would have given a much larger price than that for which it actually sold. That there were not more than five or six persons at said sale, and that there were no bidders. To show the gross inadequacy of price at which said land was sold, your petitioner states, that he has been informed and believes, that the person who attended said sale and bid for *Reverdy Johnson, Esq.*, the purchaser, was authorised to give over $18,000 for the land, and that soon after the sale, the purchaser was offered an advance of $8000 for said farm. That if an opportunity were offered, he could furnish proof of all the facts stated in this petition, and of the objections previously taken to the sale; and could also show, that he is the sole person interested in said land, except the mortgagee, for whose benefit it was sold The petition then prays, that the order of ratification may be opened, and an opportunity afforded for producing proof, and the trustees be required to answer said exceptions, and said sale set aside and a new one ordered, and for general relief.

This petition was verified in due form and accompanied by the affidavits of *seven* deponents, who resided in the neighborhood of the property, were well acquainted with it, and who severally state that it sold for much less than its actual value. The estimates of its value by these deponents vary from $60 to $75 per acre.

Upon this petition an order was passed rescinding the order of ratification, setting down the objections for hearing, with leave to the parties to take testimony before a justice of the peace, upon the usual notice, and ordering the trustees to file their answers on or before a day certain.

The *answer* of *David Stewart*, one of the trustees, states: That he was prevented by sickness from attending the sale, but under the circumstances, would have acted as his associate trustee did, in making said sale, even at the very low price at which it was made; no discretion being allowed to the trustees, by any assent of the mortgage creditor, who was urging the sale, and it having been within respondent's particular knowledge, that the postponement of the sale, on the 15th of October 1846, had been assented to by the creditor, upon the undertaking of *Dorsey*, that no further delay should be asked for than that then agreed to be given, which was until the 15th of April 1847, and that in his view, therefore, the trustees had no right to afford any further delay, except with the consent of the creditor; and under the circumstances, respondent regarded the sale, appointed for the 15th of April 1847, as a peremptory sale.

Respondent further says, that in his opinion the property was then worth at least $20,000, and is now worth that amount; and this opinion is formed, in part from the price which respondent and his associate trustee obtained, for a portion of the same property, sold at private sale, to *Charles H. McBlair*, at the rate of $75 per acre. This portion consisted of 80 acres, and was unimproved by buildings. He believes sufficient notice was given of the sale, by public advertisement, but he believes also, that there was a general impression among persons who otherwise might have been disposed to attend the sale, that some arrangement would be made, and that the sale would not proceed, how this impression originated, respondent cannot say, but it seemed to be a prevailing and accredited impression.

*Charles F. Mayer* the other trustee, separately answering, states, that the sickness of his co-trustee, devolved upon him the duty of conducting the sale alone. That said sale was

appointed positively to take place, (after at least one postponement, and considerable delay on the creditor's part;) that respondent found on the day of sale, that the creditor, the *cestui que use* of the decree, was peremptorily resolved upon having a sale made, and in consequence, respondent felt himself under a peculiarly strict obligation to effect a sale, even at a price materially beneath respondent's estimate of the worth of the property. With this persuasion of his duty, and under pressure of such a requirement, however painful the position, or the act, respondent allowed the estate to be struck off at the price of $40 per acre, as the highest bid, although if left to his own discretion, and to conform to what he deemed the reasonable valuation of the property, he would not, he believes, have allowed it to be sold at a less price than $60 per acre, that even, being less than respondent deemed it actually worth. In illustration of its value, respondent refers to the sale adverted to by his co-trustee, in his answer, which with other reasons, tended to impress upon respondent the worth of said property. He cannot say how many bids there were, but believes there were not many, he knowing of only two bidders, although from the manner of conducting auctions, there might have been more, without respondent's knowing the fact. The persons attending the sale, did not number more than ten or twelve; the two bidders referred to being *John Patterson* and *John S. Gittings*, the latter, the highest bidder, and the former making only one bid, at the beginning of the auction. He further states, that notice of sale was given by advertisement in *Baltimore*, once a week, for three weeks, and on the day of sale, in two newspapers of that city, and as respondent believes in no more. Respondent believes, that at the time of said sale, said estate was fairly worth from $65 to $70 per acre, and that it is now worth that much.

The following is a brief summary of the testimony taken under the above order.

On the part of the exceptant, it was proved, by *James McHenry Boyd*, that witness knows the property in question, by reputation; he intended to attend the sale, and bid for the property, but was prevented, by being informed that the sale

would be postponed. Deponent saw the advertisement; but after first seeing it, had been absent from town for some time, and had forgotten the precise day fixed for the sale. On his return, he enquired of one of his cousins, whether the day of sale were not at hand, who answered to the effect, that she had learned from the family of *Dr. Waters*, a neighbor of *Mr. Dorsey*, that the sale was postponed for a month, and witness then dismissed the subject from his mind. After receiving this information, he did not examine the paper with reference to the advertisement. He did occasionally look over the paper, but did not observe it. His reliance on his cousin's statement, coming directly from the friends of *Mr. Dorsey*, was such as to prevent him from making any further inquiry as to the time of sale, and to induce him to dismiss the matter from his mind. If deponent had attended the sale, he would have given $60 per acre for the property. He has no hesitation in stating, that if circumstances were such, that he was now free to be a bidder, he would now give that amount for the property. If the property were to day in the market, and could not be bought for less, he would give that amount for it. Deponent believes the market value of the property to be at least $60 per acre. His opinion is formed from what he knows of it, and from the opinions which he has heard others express, on whose judgment he relies.

*William E. Thomas*, is acquainted with the property, and has been repeatedly on it. Its value at a low estimate is $60 per acre. Deponent thinks this would be a low price at which to purchase the property at public sale. His opinion is derived from his knowledge of the place, it being good farming land. He does not consider the land in a good state of improvement. If the land were well farmed, and the improvements in a good condition, the property would be worth $100 per acre. He estimates the value of the place at $60 per acre, in its present condition.

*Daniel Warfield*, knows the property by reputation. Did not attend the sale, because there was always so much contention about it, that he did not suppose the property would be sold. It has been in the market several years, and frequently

withdrawn, and he supposed that *Mr. Dorsey* would not suffer it to be sold, if he could avoid it; would not have bid for the property, unless he could have been assured that *Mr. Dorsey* would have given peaceable possession, and there would have been no contest about it. Cannot say what is its value, but from representations he too had of it, he would give $50 per acre, could he have been assured *Mr. Dorsey* would have given peaceable possession. Deponent offered *Mr. Gittings* $50 per acre for the property, a short time after the sale.

*Stephen J. Thompson*, knows the property, has several times gone around the place, and examined it, with a view of acquiring information as to its value, with the view of purchasing it. Attended the sale, but did not bid, because he was of opinion, as he believes some others were, that the property would not be sold; was strengthened in this opinion from having at various times attended, when the same property had been frequently advertised for sale; on one occasion, neither trustee or auctioneer appeared, and on others, the property had been withdrawn. From the small number, in attendance on the day of sale, deponent came to the conclusion, that the property would not be sold, but had no right to doubt the sale was a real one, after *Mr. Gittings* was called on by the auctioneer to sign. His previous impressions were, that it was bought in for *Mr. Dorsey*. These impressions did not arise from any thing which had been said by *Mr. Gittings*, the trustee, or the auctioneer, but from what had taken place on former occasions, when the same property had been advertised; from the small number in attendance, and from the low price which the property brought. During the offering, *Mr. Dorsey* passed through the exchange, but did not remain; he did not appear concerned about the sale, and did not remain until it was closed. The property was started by *Mr. Patterson*, at $10,000. Deponent does not recollect of hearing any bid after that, until *Mr. Gittings* bid. The auctioneer stated, that the property would not be sold at less than $40 per acre, he having prior to that statement, called the property at $39.50 per acre, but deponent did not believe there was any bid, as he did

not hear one. His impression was, that the $39.50 bid, was that of the auctioneer.

From all the circumstances attending the sale, his impression was, that the property was bought in for *Mr. Dorsey.* Had it not been for that impression, he would have bid for the property, as he went to the sale for that purpose. He would have advanced on $40, the price at which the property was knocked down. Deponent thinks that at a fair sale, the property should have brought $60 per acre. He knows of a sale of property in the same neighborhood, made since the sale in this case, on which there was a very inferior dwelling house, with good out-houses, the soil naturally inferior to *Mr. Dorsey's*, but more highly cultivated, at $61 per acre, at public sale. *Mr. McBlair* bought 80 acres of the original tract, of an inferior quality to *Mr. Dorsey's*, without any improvements, at $75 per acre. This purchase was made by *Mr. McBlair* for a county residence, and one inducement was on account of the location, its fine prospect. The prospect from *Mr. Dorsey's* is superior to that from *Mr. McBlair's.* It is one of the most beautiful in *Baltimore* county.

*John Swan*, is familiarly acquainted with the property, lives on the adjoining farm, knows the quality of the soil, and its present state of cultivation, considers it land of excellent quality. It has been recently neglected, but with proper management and cultivation, would be easily restored to its original value. The situation is a very fine one. The property in its present condition, is fully worth $25,000. Deponent was at the sale, thinks *Mr. Patterson* started the sale at $10,000, heard and saw no more bidding. The auctioneer called out various sums, until he reached $34, *Mr. Gittings* then offered an advance of fifty cents. The auctioneer then remarked, that he had omitted to state at the beginning, what he ought to have done, that the property would not be sold under $40 per acre. At this moment, *Mr. Dorsey* called deponent out, to intercede with *Mr. Donaldson*, stating, that until within half an hour of the sale, he had confidently expected to procure the money; before deponent returned, the sale was closed. *Mr. Dorsey* did not continue at the sale, he was alternately

in and out, endeavoring to obtain some intercourse with *Mr. Donaldson*.

*George Myers*, owns a place on which he resides, nearly adjacent, and is familiar with *Mr. Dorsey's* property; has known it for forty years; thinks, in its present state, it is worth $80 per acre. If deponent were desirous of purchasing, he would willingly give that amount for the property.

*Henry H. Williams*, a few years ago, bought from *Mr. Dorsey* a portion of the original tract. Thinks the property ought to bring $25,000. In 1840 or 1841, deponent, who had the authority to sell it, was offered $25,000 for it, but *Mr. Dorsey* was not willing it should be sold at that price, stating that he could obtain a better price. In 1841 deponent sold a part of the original tract, at $62 per acre, on which there were no improvements or fencing.

*James Powers*, is a farmer, resides in the neighborhood of the property; has known it ever since he can remember; it has been one of the best farms in *Baltimore* county. The dwelling house is a fine one, in good order. There is a choice supply of spring water of good quality on the place. In its present state the property ought to bring, at least, $75 per acre.

*John Moke*, is a farmer, resides about four miles from *Mr. Dorsey's;* has been a property agent in *Baltimore* county for some time; has known the property for upwards of forty years; it is considered one of the best farms in that section of the county. As it stands, deponent cannot put the value of the property at less than $75 dollars per acre: he thinks it ought to bring that price at public or private sale.

*Peter W. Gibbons*, is a farmer, lives about six miles from *Mr. Dorsey;* has known the property for twenty years; would suppose that, at a fair sale, any day, it ought to bring from $70 to $75 per acre.

*Charles H. McBlair*, resides on the place adjoining *Mr. Dorsey's*, being part of the original tract. Deponent has eighty acres, which he purchased of *Mr. Dorsey* in 1843. He gave $75 per acre for it. This property, at that time, had no buildings or improvements on it, and the fences were in a bad condition. Thinks *Mr. Dorsey's* farm, in its present condition, is worth from $18,000 to $20,000.

*John S. Gittings,* attended the sale on behalf of *Mr. Johnson,* by whom he was authorised to bid as high as $60 per acre. After the sale, he was called upon by some individual, with whom he was not personally acquainted, who said, that if the title was clear, he would give an advance of $2000 on the purchase. *Mr. Warfield* offered deponent, if the title were clear, an advance of some small sum on the purchase. *Mr. Johnson* informed deponent that he expected to get the property for $40 per acre, but had made up his mind to give $60 per acre.

*John Patterson,* was the owner of a mortgage on the property; was present at the sale; went merely to cover his claim; made a bid of $20 per acre for that purpose. *John H. Ormdorff* designed purchasing the property, but did not suppose it would be sold, as he had spoken to several persons about it and had been informed it would not probably be sold, as *Mr. Dorsey* would make arrangements to pay off the mortgage. Thinks he saw the advertisement in the *American.* Would have given much more than the property sold for; would have given $20,000 for it, but relying on the information he had received, he did not think it necessary to go to the sale or examine the property.

*Henry W. Bool, Jr.,* was the auctioneer who made the sale. Thinks there were other bids, besides the starting bid by *Mr. Patterson,* and that made by *Mr. Gittings.* Thinks so from the price at which the property sold. After the sale, a gentleman told deponent, that if he had been at the sale he would have given about the amount the property sold for. Thinks he called the property at $39 per acre. He then called *Mr. Mayer* to the stand, and after consultation with him, announced, that if he could obtain $40 per acre, the property would be sold. *Mr. Gittings* bid that price and the property was knocked down to him. Prior to the sale, deponent had a conversation with *Mr. Mayer,* in which he stated to deponent, that the property ought to bring $40 per acre at least. Deponent thinks he made a bid on behalf of the trustees, near the amount of $39.

*Messrs. Gittings*, *Patterson*, *Swann*, and, including them, from thirty to forty persons were present at the sale. The sale was a fair one. Deponent did his endeavors to get the most he could for the property, he hung longer on *Mr. Gittings'* bid than he ought to have done. The company in attendance was the usual number. There never is a larger attendance at sales at the *Exchange*, except on extraordinary occasions.

On the part of the purchaser, it was proved by *John J. Donaldson*, (whose testimony was objected to by the exceptant,) that he is the president of the *Baltimore Life Insurance Company*, the assignee of the claim for which the property was sold. He attended the sale. The property was offered in the presence and by the direction of deponent. As the sale was about to commence, *Mr. Dorsey* made application to deponent to suspend the sale, for the purpose of giving him time, which deponent refused, as the sale had been previously postponed. Deponent required the trustee to go on with the sale. The property had been advertised, at deponent's instance, in the autumn of 1846. At the instance of *Mr. Glenn* and *Mr. Dorsey*, who promised that the matter should be settled up in six months, the sale was postponed, and time was given to *Mr. Dorsey* to sell at private sale, which he stated was his object. Deponent then told him, that the property would be sold at the end of that time if the matter were not settled. Deponent did not see *Mr. Dorsey* from that time to the last day of sale.

*Hugh Gelston*, on the 31st of October last, purchased a part of the same tract of land, consisting of thirty acres, at $36.50 per acre. There are no improvements on it, not even a fence. The soil is of a very good quality. It is on a point difficult of access. Separate from the consideration of great beauty of situation, and speaking in reference only to agriculture, and the expenses of putting the farm in order, deponent would consider many farms that have been sold within the last two years as good bargains as this one purchased by *Mr. Johnson;* deponent is not, however, taking into consideration in the above estimate of the value of the land, its advantages of location, for beauty of building sites, and nearness to the city; these things greatly enhance the market value of property. Taking these qualities

into consideration, deponent thinks the land ought to bring much more than it sold for.

*John S. Gittings*, recalled for the purchaser, states, that he has, within a few days, made a purchase of about two hundred acres of land, at $45 per acre. This land is about a mile further from the city than *Mr. Dorsey's*, both lying west of the city. The soil perhaps is not so good, but it is heavily timbered. It is red land. There is a considerable quantity of stone, fit for paving, on it, which was one inducement for deponent to purchase it. There are no buildings or improvements on this property. Deponent thinks if the place purchased by him were fairly brought into the market, it would bring as much per acre as that of *Mr. Dorsey's*. As a country residence, *Mr. Dorsey's* place is one of the most beautiful situations in the neighborhood of *Baltimore*. Deponent did not expect to give more for the property than about $40 per acre. During the sale, there were about thirty persons present in the rotunda of the *Exchange*. There was a small number about the stand, near the auctioneer, who appeared to be taking an interest in the proceedings. Deponent supposed that the bids for the property were real, until it had reached the bid of $37 per acre. He bid $36, and the auctioneer bid $37, which deponent thought a bid of the auctioneer.

A deed was also filed in the cause from *Rebecca Dorsey*, conveying to the exceptant the equity of redemption in the land, dated the 15th of February 1844.

On the 29th of July 1847, the following order was passed by his honor, *Judge Brewer*, acting as chancellor:

Objections were filed in this case to the sale made on the 15th of April 1847, but the sale was ratified, because the objections were entirely of matters *in pais*, not signed by counsel, and not vouched by the affidavit of the persons objecting, or of any other person, and being filed in that manner, and on the day before the time for final ratification, the whole proceeding had the appearance of a mere design to delay the ratification. On a proper application, the order was rescinded, the trustees directed to answer the petition, and testimony directed to be taken, which was taken and returned, the trustee's answers

filed, and the case heard. The 2nd objection, "because proper and reasonable notice of the sale was not given," is of no moment, as the notice which the decree required was given, and there is no evidence, that it was the custom to give any further notice in the case of sales in *Baltimore*, or in advertisements in the *Baltimore* daily papers.

The 1st objection is, gross inadequacy of price.

3rd. No competition at the sale.

4th. That persons who would have given a much larger sum for the property, were prevented from attending the sale by some mistake or misapprehension in relation thereto. The property sold for $12,000. The proof of its value varies from $50 to $80 per acre, and, on a fair average of the proof, it is worth nearly about $70.

The sale appears to have been conducted in the ordinary manner, without the least appearance of unfairness, which, indeed, the petitioner does not pretend to charge, and the property bought by an agent for the actual purchaser, and at auction at the *Exchange*, where such property is frequently, if not generally, sold. The practice of opening biddings has never prevailed in this State, and has not been contended for in this case. The principles which are to govern in its decision, seem to be well settled by abjudications of our own courts. In the case of *Lawson vs. The State*, 2 *Bl. Ch. Rep.*, 639, *Chan. Hanson* says: "That he will never, knowingly, ratify an unreasonable sale." In page 644, he says, "with respect to sales under the authority of this court, the chancellor thinks himself bound to act as if the property was his own, or held by him in trust;" that is to say, he thinks that reasons that would induce him, as proprietor or trustee, to set aside a sale made by his agent, should determine him, as chancellor, to refuse his approbation to a sale made by a trustee. Again, he says: "It is, undoubtedly, one object of each decree for a sale, to obtain the best price that can be obtained, consulting, at the same time, justice to all persons concerned, and attending to their wishes, as far as may be consistent with justice." In the case of *Goodwin vs. Scott, Bl. Chan. Rep., page* 647, *Chan. Kilty* says: "In this State it has been repeat-

edly declared, that in sales under a decree of this court, which are made subject to the chancellor's approbation and ratification, any circumstances showing that such sales are injurious to the complainants, or that better sales might reasonably and probably have been made, are sufficient to set them aside. This principle, to be just, should be reciprocal and mutual."

*Chan. Bland*, in the case of *Andrews vs. Scott, page* 644, *2nd vol.*, adopts these opinions, and says further: "That in this State, as well as in *England*, if there should be made to appear, either before or after the sale has been ratified, that there was any injurious mistake, the reported sale may be rejected; and again, "If, in any case, the trustee reports that there was an error, mistake, misunderstanding, and as to the terms or manner of the sale, it may be rejected at once." In the case of *Glenn vs. Clapp*, 11 *G. & J.*, 9, this subject came before the Court of Appeals. In that case the property sold for $490, and was alleged to be worth $900, but the only evidence of value was the answer of the trustee. He says that the property was worth more than $490, but not $900; but supposing that to be the real value, the inequality in that case and this is nearly about the same. The property in both cases sold for rather more than half its value.

The court say, in their opinion, that they will not set aside a sale for inadequacy of price merely, unless the sum reported by the trustee is so grossly inadequate, as to indicate a want of reasonable judgment and discretion in the trustee; what proportion of the real value would be that gross inadequacy, or indicate that want of reasonable judgment and discretion, the court do not say, but seem to intimate, that it does not seem to exist in the case before them, and only admit it as a reduced price, to be viewed in connexion with some other just cause, to doubt the propriety of the sale. In cases of purchase and sale by and from individuals, where applications have been made to set aside sales for inadequacy of price, the proportion of the real value has not been definitely fixed, though in one case the rule of the civil law is said to have been adopted, by which no consideration was deemed inadequate, that exceeded half the real value of the estate. *Sugden on Vendors*, 249;

and the principle was held in another, not to apply to cases of sales by auction, which the Court of Appeals seem to intimate in the case of *Magruder vs. Peter*, 11 *G. & J.*, 244. In those cases the inadequate consideration was considered an evidence of fraud. In cases like the present, it is only treated as an indication of want of reasonable judgment and discretion in the trustee, and perhaps would not therefore require so gross an inadequacy. It is not easy to determine how far the trustee should extend his discretion, but it may be considered a good general rule, not to sell the property at a great sacrifice; more especially on the first effort to sell, but to report the circumstances to the court for directions. In this case, the low price did not indicate that want of reasonable judgment and discretion as to the value, for the answer of one of the trustees shows, that he was well aware that he was selling too low, but thought himself bound to sell, as he was required to do so by the complainant; and it is of this that the petitioner's counsel complained in the argument, as a dereliction of duty or want of consideration in the trustee, contending that he had no right to consult the complainant at all, but should insist on getting what the property was worth. This, however, is going too far; the trustee did fix a limit below which he would not sell, although it should be required by complainant, and in fixing that limit, no doubt considered that his estimate of the value though much higher, might not agree with the estimate of others. There certainly is no impropriety in consulting the parties interested in the sale, or any of them, but the trustee ought to exercise a reasonable discretion and not be governed by either party. There are other circumstances in this case, which, viewed in connexion with the low price for which the property sold, and the fact of the trustee selling against his own opinion, at the instance of the complainant, disclose sufficient grounds for doubting the propriety of the sale, and for setting it aside. First, there was no competition whatever, as is clearly proved, and secondly, there was evidently a mistake as to the sale taking place, which prevented a bidder from attending who wished to attend, and who would have given a much higher price for the property. It is contended for the pur-

chaser, that this mistake was designed and caused by the petitioner himself, who spread the report that the property would not be sold, but this does not accord with the proof; the information was derived from a neighbor or friend of the petitioner, who did not profess to have received the information from the petitioner; and it was further proved, that this person who proposed to purchase, did not see the advertisement in the paper, and was informed it was not there; and it is also stated by one of the trustees in his answer, that he believes there was a general impression among persons, who otherwise might have been disposed to attend the sale, that some arrangement would be made. The purchaser, however, who is not in fault in any respect, is entitled to his costs.

It is thereupon, this 29th day of July 1847, adjudged and ordered, that the sale made on the 15th day of April 1847, be and the same is hereby set aside and annulled, and the petitioner is ordered to pay to the purchaser his costs, to be taxed by the register.

From this order the purchaser appealed to this court.

The cause was argued before Dorsey, C. J., Spence, Martin, Magruder and Frick, J.

By Alexander and McMahon for the appellant, and
By Farnandis and Nelson for the appellee.

Martin, J., delivered the opinion of this court.

This case comes before the court, upon an appeal from an order of an associate judge, of the third judicial district, sitting for the chancellor, vacating a sale made to the appellant, on the 21st of April 1847, under a decree of the chancery court.

It appears from the record, that objections to the ratification of this sale, were interposed by the appellee, prior to its confirmation. But they were not sustained by the affidavit of the exceptant, or verified by that of any other person, and in this predicament, they were disregarded by the judge, to whom the application was preferred, and the sale ratified on the 24th of June 1847.

This order was, however, subsequently rescinded, and in considering therefore, the questions presented on this appeal, they are to be treated as uninfluenced by a final order of ratification.

The objections to the validity of this sale, as filed below, and relied upon in the argument of the cause, before this court, are in substance, as follows:

1. Because notice of the sale was not given, as required by the terms of the decree.

2. That in consequence of some mistake or misunderstanding, prevailing in the community, that the sale would not take place, various persons, who were desirous of purchasing the estate in question, were prevented from bidding for the same, and that in this way it was sacrificed.

3. That in consequence of this mistake, or misunderstanding, there was in fact, no competition at the sale.

4. That the price at which the property sold, was grossly inadequate.

There is no force in the *first* objection. By the terms of the decree, the trustees were required to give, "at least three week's previous notice, inserted in some newspaper or papers, and such other notice as they might think proper, of the time, place, manner and terms of sale," and the appellee has, in is petition admitted, that the trustees advertised this sale once a week for three weeks, and once on the day of sale, in two daily newspapers in the city of *Baltimore* This certainly was legal notice of the sale. It is a misconception of the character of the decree, to suppose, that it imposed upon the trustees the obligation to advertise the property daily, for three weeks previous to the sale. The language of the decree does not warrant such a conclusion. And we should be indisposed to countenance a construction, which would operate most severely and injuriously upon the interests of a debtor, already embarrassed, by subjecting him to an onerous and useless expense.

The *second* objection is equally untenable. The appellant is a stranger to the controversy in which this proceeding originated. His position is that of a party, who having purchased

in good faith, an estate, at public sale, regularly conducted and fairly made, under the authority and supervision of the court of chancery, now claims to have his contract ratified, as obligatory on both parties. And in a case thus situated, it is perfectly clear, that the sale cannot be disturbed upon the ground of *mistake*, unless the mistake has been generated by the conduct of the purchaser, or can be traced to the creditor, at whose instance, and for whose use, the property was sold, or to the trustee to whom the control and management of the sale was confided.

The *American* cases are full and conclusive on this point; and the proposition is sustained by the most eminent of the *English* Chancellors, whose opinions are to be received as illustrative of the law upon this subject, when expressed with respect to applications for opening sales, after their absolute confirmation.

It will be found by consulting the authorities, that this principle is firmly established, not only as a rule of public policy and convenience, but one in which the debtor himself is directly and deeply concerned, as a means of rendering these sales productive, by imparting to them the character of permanence and security.

The principle is thus correctly and clearly stated by the vice chancellor, in the case of *Woodhull vs. Osborne*, 2 *Edward's Rep.*, 616.

"Where a stranger or third person becomes the purchaser in good faith, something more than a mere offer of a higher price must appear, to induce a re-sale: Such as fraud or misconduct of the master, or other person, having the control of the sale, or surprise upon the party interested, or his having been misled as to the time and place of sale. Where circumstances of the latter description are relied upon, the party must show they proceeded from or were caused by the purchaser, or some person connected with or having the management of the sale. If he be of full age and under no disability, he cannot be permitted to allege his own negligence or inattention, as the cause of his surprise or mistake."

In *Collier vs. Whipple*, 13 *Wend.*, 226, *Mr. Justice Nelson*, after citing, with approbation, the cases of *Morrice vs. Bishop of Durham*, 11 *Ves.*, 57, and *White vs. Wilson*, 14 *Ves.*, 151, says:

"These cases, without going further, sufficiently shew that fraud or misconduct in the purchaser, or fraudulent negligence in any other person connected with the sale, as the agent of the mortgagor, or of persons interested as judgment creditors, and also surprise created by the conduct of the purchaser, will induce the court to open the biddings." And at page 228 of the opinion, he distinctly expands the rule so as to embrace the master;—correctly maintaining, "that surprise created by him on his conduct, is as injurious and as available in an application of this kind, as if caused by a purchaser; which all the cases concede is sufficient."

In *Gardiner vs. Schermerhorn*, 1 *Clarke's Rep.*, 103, the language held by the vice chancellor, is equally strong.

And in the case of *Williamson vs. Dale*, 3 *John. Ch. Rep.*, 292, the chancellor, in setting aside a sale, on the ground that the defendants were misled, though unintentionally, by the language of the plaintiff and his solicitor, said: "That he was not influenced by the alleged inadequacy of the auction price, and that in disturbing the sale, he pushed the doctrine to the utmost verge of an admissible interference."

In *Morrice vs.* the *Bishop* of *Durham*, 11 *Ves.*, 57, *Lord Eldon*, after animadverting upon the decision of *Lord Commissioner Ashhurst*, in *Watson vs. Birch*, 2 *Ves., Jr.*, 51, said:

"That the only case in which the biddings can be opened, after confirmation of the report, is, where there is some fraud or misconduct in the purchaser, or fraudulent negligence in another person, as the agent, of which it is against conscience that the purchaser should take advantage." *White vs. Wilson*, 14 *Ves.*, 151.

It cannot be pretended in this case, that the mistake, of which the appellee complains, is to be attributed to the conduct of the creditor, the trustees, the vendee, or their agents, and upon the doctrine enunciated in the cases to which we

have referred, the purchaser is not to be treated as accountable for the consequences of the alleged mistake, however injuriously it may have operated upon the sale.

But what is the nature and origin of this alleged mistake? *Mr. Stewart* in his answer to the petition of the appellee, states:

"That he believes sufficient notice was given of the sale, which was by public advertisement, but he believes also, that there was a general impression among persons who might otherwise have been disposed to attend the sale, that some arrangement would be made, and that the sale would not proceed. How this impression originated he cannot say, but it seemed to be a prevailing and accredited impression."

How the impression to which the trustee refers, arose, or by whom it was propagated, is not distinctly disclosed by the testimony in the cause. But when it is recollected, that the exceptant, at the time he solicited the intercession of *Mr. Swann* with the creditor, for the purpose of arresting the progress of the sale, stated, "that until within half an hour of the sale, he had confidently expected to procure the money," the inference is legitimate, that the impression, mentioned by the trustee, "that some arrangement would be made, and that the sale would not proceed," was generated by the debtor himself, under the hope, sincerely and honestly entertained, that he would be able before the sale to raise a sum, sufficient for the payment of the mortgaged debt, and that in this way the sale would be arrested.

At all events it is difficult to believe under the circumstances of the case, that this impression in the community to which *Mr. Stewart* refers, was not known to the exceptant. If so, it was his plain and imperative duty to have communicated its existence to the trustees, that they might have guarded the sale against its influence, and an act of such remissness and negligence on the part of the debtor, would be regarded, irrespective of other considerations, as presenting an insuperable obstacle, to the interposition of a court of equity.

It was indeed contended by the counsel for the appellee, that the knowledge of this impression was in the possession of

one of the trustees, prior to the day of sale, and that he was obnoxious to the charge of a gross dereliction of official duty, by not adopting in connection with his co-trustee, such means as might be necessary to disabuse the public mind of this error, before the property was exhibited at public auction. But there is no foundation for this imputation. It is perfectly apparent on a fair construction of the answer of *Mr. Stewart*, that the information referred to, was not acquired by him until after the sale.

The *third* objection is in the following words: "Because there was no attendance of bidders at the said sale, and no competition, in consequence of which the said property was sold far below its value." This exception literally interpreted is of course in conflict with the undisputed facts in the cause, but the point of the objection is, that in consequence of the impression before referred to, with respect to the arrangement of this debt, and the arrestation of the sale, the sale was depressed, and competition prevented.

We have already seen, that the appellant is not to be considered as responsible for any injurious consequences, which may have resulted from the prevalence of this mistake.

But is it true, as maintained by the counsel for the appellee, that competition was hindered, and that persons disposed to become the purchasers of this property, were discouraged from bidding by a mistaken impression, that the sale would not proceed?

We think not. *Mr. Boyd*, certainly, was not detained from the sale, from any misapprehension of this kind. Notwithstanding he was informed by notice in the newspapers, that the sale was appointed for the 21st of April, he declined to attend, upon information derived entirely from those who lived in the vicinity of the appellee, that the sale would be postponed for one month. And upon this intelligence he acted, without seeking to be correctly informed upon the subject, by reference either to the debtor, or to the trustees. It is scarcely necessary to say, that to disturb a fair sale upon a ground like this, would be without precedent, and of the most mischievous ten-

dency. The absence of this gentleman from the sale, was obviously the result of his own remissness.

It appears from the testimony in the cause, that among the persons assembled at this sale, there was at least one of those gentlemen designated by the exceptant as disposed to become the purchaser of the property, at a larger price than that which was obtained for it.

Why, then, were there not more bidders?

The auctioneer after consulting with the trustee, announced his determination not to sell the property, unless forty dollars an acre was offered for it. This communication was calculated to stimulate competition. It was an annunciation that the sale was not formal,—that it would proceed,—and apprised those interested in the purchase, that it would be sold at forty dollars an acre, unless more was bid for it. The auctioneer states, that he paused upon the bid of *Mr. Gittings*, "longer than he ought to have done, under the hope of getting an advance." And yet there was no proposition of an advance upon that bid.

Under such circumstances, it is difficult to resist the inference, either that the property was not considered as intrinsically worth more than the sum offered for it by the agent of the appellant, or that there was an invincible repugnance to purchase this estate, in opposition to the wishes of the debtor. The testimony of one of the witnesses on this point, is exceedingly significant. He says, "*that he does not know the property, but if there had been no contention*, and he could have obtained *peaceable possession*, he would have given for it fifty dollars per acre."

The last objection raises the question with respect to the alleged inadequacy of the auction price, at which this property was sold.

The testimony on the question of value, in this case, is chiefly composed of the opinions of witnesses, familiar with the property. But nothing can be more precarious and uncertain as a standard of value, than that created by these diversified and speculative opinions. Each opinion is constituted of different elements, depending upon the taste, habits, pursuits, and feelings of the witness.

The *English* practice of opening the biddings as a matter of course, before the ratification of the master's, report has not been adopted in *Maryland*. We have said in a former case, that it is not expedient to introduce it here. But if the biddings are to be opened, there is wisdom in the *English* rule, acted upon in the chancery courts of *New York*, which provides, that a resale shall not be ordered, unless there is an actual advance upon the original bid.

The true test of value in these applications is to be found in the inquiry, with respect to the sum which the property would produce in the market upon a resale, and on this subject we have no reliable information, as there has been no proposition of an advance on the sum bid for this estate by *Mr. Gittings*.

It is however not necessary to pursue this inquiry. We are perfectly satisfied, that according to the doctrine now settled by an unbroken series of adjudged cases, that assuming this property to be worth the sum of twenty thousand dollars, the estimate placed on it by the exceptant, but to which we do not accede, the court would not be authorised to vacate the sale, upon the single ground that the consideration was inadequate.

In the case of *Duncan against Dodd*, 2 *Paige*, 99, the property sold at a master's sale for half its value. A resale was ordered on the condition that the petitioner gave sufficient surety to the master, that the premises should produce an advance of *fifty per cent*. And in this strong case the chancellor placed his decree upon the ground, that the property was the only dependance of two infant children, and that it was sacrificed through the misapprehension, or negligence, of their mother, or step-father.

After stating, that in such sales, it is essential to the interests of those whose property is sold, that purchasers should continue to retain full confidence in the safety of such purchases, and that they will not, as matter of course, be disturbed merely because a good bargain has not been obtained:—The chancellor said:

"If the defendants were adults, and the property had been sacrificed by their own negligence or inattention, I should not disturb the sale."

In the case of the *American Insurance Company vs. Oakley*, 9 *Paige*, 259, the property, consisting of two lots, was sold together, for the sum of $21,000, when, as the affidavits in support of the application stated, "the premises were worth, and would have brought, $10,000 more, if the same had been sold in parcels."

On this ground the sale was rescinded. But the chancellor said:

"If the premises had been put up and sold in parcels, I think it is not a case in which the court ought to have interfered with the sale, although the property was only sold for about two-thirds of its supposed value. * * * * * If the property is duly advertised and fairly sold by the master, in the usual manner, to a stranger to the suit, mere inadequacy of price is not a sufficient ground for depriving the vendee of the benefit of his purchase, unless the inadequacy is so great as to be evidence of fraud or unfairness in the sale."

In *Williamson vs. Dale*, 3 *John. Ch. Rep.*, 290, the mortgaged premises were bid off at $2700, subject to a prior mortgage for the same amount; and the petitioners for a resale, stated the value of the property to be more than $12,000.

This sale was vacated on the ground of surprise. And *Chancellor Kent*, in pronouncing his decree, said:

"I wish to be distinctly understood, that I interfere on the ground of surprise, and that I do not lay any stress upon the alleged inadequacy of the auction price. Such a ground, unattended with other circumstances, is insufficient."

In the case of *Cohen against Wagner*, (6 *Gill.*, 97,) decided by the Court of Appeals, at the December term 1847, the property was purchased for $13,000; and the exceptant, in his application for a resale, averred, that the property was worth $20,000. The application was rejected by the court, and on the question of the alleged inadequacy of the auction price, they said:

"Under the third exception a third ground is relied on, for withholding the ratification of the sale, for $13,000, of property alleged to be well worth fifteen or twenty thousand dollars, or more. From the views entertained of the effect which would

result from the asserted inadequacy of price, if it, in truth, existed, it is deemed unnecessary to inquire, whether the assertion be sustained by proof? The practice of opening the biddings in chancery sales, upon the mere offering of an advance upon the purchaser's bid, has not been adopted in *Maryland;* and its non-adoption is founded on cogent reasons of justice and policy. The doctrine, that mere inadequacy of price in a chancery sale, where the sale has been made conformably to the powers and directions specified in the decree, is not of itself sufficient ground for vacating the sale, has been so frequently announced by the judicial tribunals of this State, that a special reference to authorities, to sustain it, is deemed unnecessary. A sale thus made will not be set aside, or its ratification refused, unless the court believe that such inadequacy was the result of fraud, surprise, mistake or unfairness in the sale." And in the concluding paragraph of the opinion, the court announce the principle, that to set aside a sale, upon the ground of mere inadequacy of price:

"It must be so gross and inordinate, as to furnish evidence of misconduct or fraud in the trustee."

This, unquestionably, is the sound and correct doctrine upon this subject. It is certainly true, that inadequacy of price is to be regarded as a strong auxiliary argument, in combination with circumstances calculated to cast doubt or suspicion upon the correctness of a sale. But standing alone, as it does in this case, it is insufficient to authorise an interference with the sale, unless, in the language of the court, in *Cohen against Wagner,* it is so inordinate, as to indicate some mistake or unfairness in the sale, for which the purchaser is responsible, or misconduct or fraud in the trustee, to whom the management of the sale has been committed.

In the answer of *Mr. Mayer,* one of the trustees, to the petition of the exceptant, he states: "That the sale was appointed positively to take place, after at least one postponement, and considerable delay on the creditor's part, and that he found on the day of the sale, that the creditor was peremptorily resolved on having a sale made, and he felt himself under a peculiarly strict obligation to effect a sale, even at a price materially be-

neath his estimate of the worth of the property. With this persuasion of his duty, and under the pressure of such a requirement, however painful the position, or the act, he allowed the estate to be struck off at the price of forty dollars per acre, as the highest bid, although, if left to his own discretion, and to conform to what he deemed the reasonable valuation of the property, he would not, he believes, have allowed it to be sold for a less price than sixty dollars per acre, that even being less than he deemed it actually worth."

And this paper has been relied on by the counsel for the appellee as evidence, that in prescribing the terms upon which this sale was to be made, the trustee permitted his own judgment and discretion to be controlled by the creditor. It was exhibited in strong language to the court, as a written confession of indiscretion and misconduct in the trustee, which, if not mitigated by the consideration, that he acted under a gross misconception of his duty, would be regarded as amounting almost to official turpitude.

But we do not think that the conduct of the trustee is susceptible of this construction.

It appears that this debt was of long standing. That the property had been before twice advertised for sale, the last time on the 15th of October 1846. It is in proof, that on the last occasion the sale was postponed by the creditor, at the solicitation of the appellee, and upon his promise that the debt should be paid in six months, and under an assurance from *Mr. Donaldson*, that if the matter was not then settled, the property would be sold. And we are informed by one of the trustees, that it was within his particular knowledge, that the postponement of the sale advertised to take place, of Thursday, the 15th of October 1846, was assented to by the creditor, upon the undertaking of the petitioner, that no further delay should be asked.

The right of the creditor, under such circumstances, to demand that the property should be offered for sale at public auction, cannot be questioned. A refusal on the part of the trustee to comply with so reasonable a request, would have subjected him to detrusion from his office by the court who appointed him.

But in yielding to the requirements of the creditor, he reserved to himself the privilege, which he undoubtedly possessed, of guarding this property from sacrifice, by fixing a limit below which it was not to be sold. And it is a mistake to suppose, that the trustee, in limiting his *minimum* price at forty dollars an acre, submitted himself to the rule and will of the creditor. His answer does not justify such a conclusion, and in this act we can perceive no manifestation of either misconduct or unfairness. It would be an extraordinary proposition to maintain, that on a sale like this, it was the duty of the trustee to have designated a sum equal to the *maximum* value of the property, as the lowest price at which it should be sold. In *Cohen vs. Wagner*, where the sale was upheld, the *minimum* price fixed by the trustee was $12,500, in relation to property asserted to be worth $20,000.

It follows from the views thus expressed, that we think the judge below erred in setting aside this sale, and his order is therefore reversed.

ORDER REVERSED.

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DAVID WAGNER *vs.* ADAM HOLBRUNNER.—*December* 1848.

In an action of slander, where the plaintiff, to prove malice and aggravate the damages, gives in evidence other and different words, spoken subsequent to those laid in the declaration, the defendant, to repel the malice, and in mitigation of damages, may give the truth of such new matter in evidence, under the plea of not guilty, even though such new words be in themselves actionable.

Where the plaintiff confines himself to the proof of the words laid in his declaration, the defendant, although he will not be allowed to give in evidence the truth of the defamatory matter, without a special plea of justification, may yet, on the plea of not guilty, prove in mitigation, such facts and circumstances as shew a ground of suspicion, not amounting to actual proof of the guilt of the plaintiff.

APPEAL from *Frederick* county court.

This was an action on the case instituted by the appellee, (the plaintiff below,) against the appellant, (the defendant below.)

on the 17th of December, 1844, for words spoken by the latter, of and concerning the plaintiff in the way of his trade and business, as a house-carpenter and cabinet-maker, on the 14th of December, 1844.

The words laid in the declaration as spoken by the defendant, are :

1st Count. "You (meaning the said *Adam*,) know very well, that every person in this town (meaning the town of *Woodsborough*, in *Frederick* county,) that you (meaning the said *Adam*,) work for, have their eyes upon you, (meaning the said *Adam*.) They (meaning the people of *Woodsborough*, for whom the said *Adam* worked,) very well know that you (meaning the said *Adam*) will cheat them, (meaning the said people of *Woodsborough*,) if you (meaning the said *Adam*,) get a chance. Here stands a man (meaning a certain *Paul Cormack*, whom he, the said *David*, touched on the shoulder with his hands,) whom you (meaning the said *Adam*,) cheated out of eighty dollars. (The said *Adam* asked of the said *David*, how? You (meaning the said *Adam*,) cheated him (meaning the said *Paul Cormack*,) in building that house; (meaning a house which he the said *Adam*, as a house-carpenter, had built for the said *Paul Cormack*.) I (meaning himself, the said *David*,) can prove it by *Cormack;* (meaning by all these words taken together, that he, the said *Adam*, in the way of his trade and business as a house-carpenter and cabinet-maker, was a dishonest cheat, and that he had cheated *Paul Cormack*, in the way of his the said *Adam's* trade, out of the sum of eighty dollars.

2nd Count. "There is nobody you (meaning the said *Adam*), have dealings with, but you (meaning the said *Adam*,) cheated; you (meaning the said *Adam*,) are a cheat, and I, (meaning himself, the said *David*,) can prove it; (meaning that he, the said *Adam*, was dishonest, and a cheat in his dealings, in the way of his said trades and business as a house-carpenter and cabinet-maker.)

3rd Count. "You (meaning the said *Adam*,) are a cheat; you (meaning the said *Adam*,) know you (meaning the said *Adam*,) are a cheat, and every body knows you (meaning the

said *Adam*,) are a cheat. You (meaning the said *Adam*,) have cheated this man, (meaning a certain *Paul Cormack*, who was present) out of eighty dollars; (meaning that he the said *Adam*, was a cheat in the way of his trade as aforesaid; and had in the way of his trade and business aforesaid, cheated *Paul Cormack*, out of the sum of eighty dollars, in working for him as a house-builder.)

The defendant pleaded not guilty.

Exception. The plaintiff after proving the words as laid in the declaration, further to support the issue on his part joined, and for the purpose of proving malice in the defendant, or the *quo animo*, with which the words in the declaration were spoken, proved by *Waesche* a competent witness, that in a conversation he had with *Wagner* at another time and a different place, and prior to the institution of the suit in this case, *Wagner* said to witness, that *Holbruner*, the plaintiff, was not to be trusted; *Paul Cormack* had employed him as a carpenter, but would now employ him no more. And the plaintiff further, for the same purpose, proved by *J. W. Hedges*, that in a conversation he had with the defendant, at another time and place, and subsequent to the speaking the words in the declaration, the defendant said to him, that he *(Holbruner,)* had cheated *Cormack*, and would have cheated *Solomon Derr* if it had not been for his oldest daughter. And thereupon the defendant, to support the issue on his part joined, and for the purpose of rebutting the evidence of malice in the defendant, so far as the testimony of *Waesche* and *Hedges* went to prove malice in the defendant, offered to prove by *Paul Cormack*, that the plaintiff had charged him the sum of eighty dollars more for a job of work than the plaintiff had agreed with *Cormack* to do it for, by express contract; and that the plaintiff had wronged *Cormack* out of about forty dollars in making such over charge, to which testimony so offered by the defendant as aforesaid, and for the purpose aforesaid, the plaintiff objected. And the court, (Martin, C. J., and Marshall and Buchanan, A. J.,) were of opinion, that the evidence so offered by the defendant for the purpose aforesaid, was not admissible, and refused to let the same go to the jury; to which

opinion and refusal of the court, the defendant excepted, and the verdict and judgement being against him, (the damages being assessed at $250,) appealed to this court.

The cause was argued before Dorsey, C. J., Spence, and Frick, J.

By F. A. Schley, for the appellant, and
By Palmer, for the appellee.

Frick, J., delivered the opinion of the court

This was an action on the case for words spoken of the appellee, in reference to his trade as a carpenter. The defendant's plea was "not guilty." The words laid in the declaration and proved, were: "1st. Here stands a man (*Cormack*,) whom you cheated out of eighty dollars in building his house, and the people of *Woodsborough* know well you will cheat them, if you can get a chance, (meaning thereby that the said appellee was a dishonest cheat in the way of his trade and business.") The 2nd count charges these words: "There is nobody you have dealings with, but you cheated; you are a cheat, and I can prove it." And the 3rd count charges the words: "You are a cheat and every body knows you are a cheat. You have cheated this man, (*Cormack*, who was present,) out of eighty dollars."

The plaintiff then, further to prove malice in the defendant, and the *quo animo* with which the words were spoken, gave in evidence, that at another time and a different place, the appellant said to another witness, "that the appellee was not to be trusted; that *Cormack* had employed him as a carpenter, but would employ him no more." And further for the same purpose, proved by a third witness, that at another time and place, the appellant said, that "the appellee had cheated *Cormack*, and would have cheated *Solomon Derr*, if it had not been for his eldest daughter."

These latter charges of the appellant were made *subsequent* to speaking the words laid in the declaration. And for the purpose of rebutting this evidence of malice, so far as regards the speaking of *the words not laid in the declaration*, the ap-

pellant offered to prove by *Cormack*, "that the appellee had charged him the sum of eighty dollars more for a job of work, than had been agreed upon by express contract; and that he had wronged *Cormack* out of about forty dollars in making such over charge."

This evidence being objected to by the appellee, as inadmissible for that purpose, the court below sustained the objection, and refused to let it go to the jury. And the verdict and judgment being against the appellant, the case is now before this court, upon his bill of exception.

The principle which determines this case is already to be found among the decisions of this court in 6 *G. and J.*, 413, *Rigden vs. Wolcott*. As in all actions of slander, the plaintiff is permitted to prove the malicious intent, in order to aggravate the damages, so the defendant, to repel it, may shew grounds of suspicion of the truth of the charge, by facts and circumstances; not in bar of the action, but in mitigation of damages. And such proof may be introduced to any extent not amounting to a justification of the charge. Any evidence short of this he may offer, to shew that the words were spoken under an impression or conviction of their truth, and not with any malicious intention. See 3 *Steph.*, *N. P.*, 2579. "Although the defendant is not allowed to give in evidence the truth of the defamatory matter, without a special plea in justification, yet he may, on the plea of not guilty, prove in mitigation, such facts and circumstances, as shew a ground of suspicion, not amounting to actual proof of the guilt of the plaintiff. Cited 1 *M. and S.*, 284. 1 *C. and P.*, 279. 11 *Price*, 235. *Willes*, 20.

All this the defendant is permitted to do under the plea of "not guilty;" provided it does not cover the whole of the charge, and constitute a justification; supposing only the words laid in the declaration proved against him. If the plaintiff resorts to the proof of other defamatory charges, not laid in the declaration, for the purpose of proving malice or aggravating the damages, is the rule, or the reason of the rule, less operative?—*a fortiori*, it is the more applicable, that the defendant may repel the presumption of malice, from the new

matter introduced. He may do more. As to the words proved against him, and not declared upon, he may justify them. They are not in the record. He hears them for the first time at the trial: and although it is the privilege of the plaintiff to introduce and prove such new matter, it is a right in the defendant to reply to it, by giving the truth of such new matter in evidence. He is debarred from pleading to them by the act of the plaintiff, and has otherwise no opportunity to reply. The doctrine would indeed be harsh and severe in the extreme, that would forbid him to repel, or prove the truth of such new charges. It is however otherwise.

"When other words not specified in the declarations are given in evidence to prove malice, the defendant is at liberty to prove the truth of the words, for he had no opportunity of justifying;" although the words so given in evidence be in themselves actionable. 2*d Stark. Ev.*, (6 *Am. Ed.*,) 465. 3 *Steph., N. P.*, 2580. 2 *Stark., R.*, 457. *Warne vs. Shadwell.* See also *Bull., N. P.*, 10. the case of *Collinson vs. Loder.*

Thus then, if the appellee had confined himself to the proof of the words laid in his declaration, without relying upon the subsequent words of the appellant, to shew the malice, it was competent for the appellant to explain the *quo animo*, and repel the malice, by any other evidence, short of a justification of the words laid in the declaration. When he went beyond this, and proved other slanderous words, *not* in the declaration, spoken at other times and other places, and this for the purpose of enhancing his damages, it was the right of the appellant, so far as this testimony went to prove the malice, to repel it, by proving the truth of this extrinsic matter, and thus lessening the damages. The proof thus offered by the appellant, is to meet the charge of malice, not to defeat the appellee's action. Limited to this purpose, short of a justification of the words laid in the declaration, it was his privilege under the plea of "not guilty," to produce it. Any other rule, would in every such case, deprive a defendant of all means of explanation, take from him every palliating fact and circumstance that

ought to go in mitigation of the offence, and leave him defenceless in the hands of the plaintiff and the jury.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

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## William W. Williams *vs.* George H. Williams.—*December* 1848.

An appeal will lie from a decree of the court of chancery, upon a mortgage executed in conformity with the provisions of the act of 1833, ch. 181, relating to mortgages in *Baltimore* city.

Any interference with the right of appeal, wherever it exists, must be upon strong grounds, and a clear manifestation on the part of the legislature, that they designed to withdraw it.

In providing a summary mode of obtaining a decree, the legislature did not intend, by the act of 1833, ch. 181, to limit the general jurisdiction of the court of chancery, (from whose decrees, at all times, the right of appeal exists,) in cases of mortgages.

An appeal will not lie from a decree, which, upon its face, appears to have been made by consent of parties; but such an objection must be taken upon the final hearing, and not upon motion to dismiss.

The agreement for a decree in a mortgage, executed under the act of 1833, is to be regarded only as a consent, to dispense with the intermediate proceedings of subpœna and answer, in order to facilitate a decree, and not that the decree shall be binding at all hazards.

An appeal will not lie from a special and limited jurisdiction, unless, by the act creating such peculiar jurisdiction, the right is expressly given.

Appeal from the Court of Chancery.

The appellant executed a mortgage to the appellee, dated the 18th of March 1846, of certain real estate in the city of *Baltimore*, to secure the sum of $150, upon certain terms therein mentioned, and further reciting, that "to secure the punctual payment of said sum of money, according to the terms of the loan thereof, the said *William W. Williams* hereby consents and agrees, that at any time after the execution of these presents, a decree may be entered up for the sale of said lots of ground, and premises, hereby mortgaged or any part thereof, by the high court of chancery of *Maryland*, or by *Baltimore* county court, sitting as a court of equity, in

compliance with the act of the General Assembly of *Maryland*, passed at December session 1833, entitled, An act relating to mortgages and the supplements thereto."

On the 13th of October 1847, the mortgagee filed a petition in the court of chancery, setting forth this mortgage, and praying for a decree for the sale of the mortgaged premises, under the act of 1833, ch. 181, and on the 21st of the same month, the chancellor passed a decree for a sale in the usual form; appointing a trustee, prescribing the terms of sale, &c, from which the appellant, the mortgagor, appealed.

The cause was argued before Dorsey, C. J., Spence, Martin and Frick, J., on motion to dismiss the appeal.

By for appellant, and
By James Malcolm, for the appellee.

Frick, J., delivered the opinion of this court.

This is an appeal from a decree obtained in the court of chancery, upon proceedings under a mortgage, had in conformity with the provisions of the act of 1833, ch. 181, relating to mortgages.

A motion is made to dismiss the appeal, upon the proposition argued before this court, that under the true construction of the act, the decree is to be considered a decree by consent, from which no appeal will lie.

The court can find nothing in the act of Assembly, impugning the ordinary right of the party, to appeal from a final decree in chancery; or to justify the construction contended for by the counsel for the appellee.

The 2nd section of the act recites, "(in order to the facilitating the enforcement of mortgages of real estate in the city of *Baltimore*,) that in all cases of conveyances, by way of mortgage of lands or chattels real, in the city of *Baltimore*, and where in such conveyances the mortgagor shall declare his assent to the passing of a decree, as hereinafter mentioned, it shall and may be lawful for the mortgagees, or their assigns, at any time after filing the same to be recorded, to submit to the chancellor, or to *Baltimore* county court or any judge

hereof, the said conveyances, or copies under seal of said county court thereof and the said chancellor, or court, or judge thereof, may thereupon forthwith decree, that the mortgaged premises shall be sold at any one of the periods limited in said conveyances, for the forfeiture of said mortgages, or limited for a default of the mortgagors, and on such terms of sale, as to the chancellor, court or judge, shall seem proper; and shall appoint by said decree a trustee or trustees for making such sale, with requisition of bond and surety, for performing of the trust as is now usual in cases of sales of mortgaged property."

The third and fourth sections of the act provide, in substance, that after the arrival of the period limited for said sale, the mortgagees, their executors, administrators or assigns, before such sale, shall make and file a statement of the amount of the mortgage claim remaining due, verified upon oath; and that such sale shall have the same effect if finally ratified, as if it had been made under decrees between the proper parties, and in the usual course of said courts; and upon report of such sale for its consideration, any allegations may be made, and proofs exhibited, to shew that the sales aforesaid ought not to have been made, and the court may reject, and set aside said sale.

Very sound reasons should be required to induce the court to refuse a party the benefit of an appeal; and any interference with the right, wherever it exists, must be upon strong grounds and a clear manifestation on the part of the legislature, that they designed to withdraw it.

Surely it could not have been the intention of the legislature by this act, to limit the general jurisdiction of the courts of chancery in cases of mortgage; more especially in one particular section and locality of the State. The subject is one of appropriate jurisdiction in that court, from whose decrees, at all times, the right of appeal is secured to either party. And by this act of Assembly pointing out a summary mode of proceeding, by which the mortgagee may arrive at a decree, by stipulating for it in his mortgage, it cannot be assumed to limit the general jurisdiction over that large class of cases, upon which this court, as an appellate court, has hitherto exercised its corrective influence.

The proposition is: that in passing decrees under this act the court of chancery exercises only "a special and limited jurisdiction," which in such cases excludes the right of appeal unless expressly given by the act that creates the peculiar jurisdiction; as in the cases cited in 8 *G. & J.*, 443, *Wilmington Rail Road Co. vs. Condon*, and in 5 *Gill*, 89, *Willliams vs. Williams*. But in those cases the jurisdiction given to the county courts, as in many other similar cases, is manifestly limited and final; and not part of a general jurisdiction, which the act of Assembly leaves as it found it. It simply provides a summary mode of reaching the decree, by dispensing with the subpœna and answer, where the mortgagor shall, in his mortgage declare his assent, upon the terms therein stated. And such is the plan devised by the act "to facilitate the enforcement of mortgages in the city of *Baltimore*" as expressed by way of preamble and inducement to the act. In every other respect the instrument retains the character of a mortgage, open to all legal objections; not excluding any that may be properly made to the proceedings themselves under the mortgage, as not within the meaning of the act, and which may be a fit and proper subject for litigation and appeal.

But it is confidently urged that the party is here precluded from appeal; the decree when entered being a decree by consent. If this were objected to the decree upon a final hearing, and not upon a motion to dismiss, the objection might well be entertained. Still the court here, regard the agreement only as a consent to dispense with the intermediate proceedings, in order to facilitate a decree;—not that the decree shall be binding at all hazards. For such a purpose, and to estop the party from all objections, the court conceive, that the consent, as is usual, should be part of the decree itself, or endorsed upon it. And this view is supported by the authorities cited on the part of the appellee himself, in 1 *Cowan*, 709.

The court say, "the decree purports to be made by consent. We must take the fact as stated in the decree, and from a decree by consent, no appeal or rehearing lies." In *Ambler*, 229, *Bradish vs. Gee*, it is said "where a decree is made by consent of counsel, there lies no appeal or rehearing." And

in the cases further cited in *Dick.*, 38, 1 *P. W.*, 734; 3 *Gilb. Equ. Rep.*, 185, the decree itself was pleaded; shewing the evidence of consent was on the face of the decree. Such decrees are common in the *Maryland* practice, and of course, upon final hearing, such appeal is not entertained, where the assent and decree are one connected act. But here, in the case presented by the act of Assembly, the chancellor enters up a decree prospectively with reference to the possible default of the mortgagor, when in fact no such default may ever happen. So far the party has assented to be bound, by a decree, covering the terms and conditions of the mortgage; and has the party assenting to such decree no right to see that the terms are complied with? Upon such a doctrine the mortgagor would be precluded from shewing, that no decree ought to pass, upon a case made by the petition and mortgage, however defective the allegations and the case may be stated. It is certainly his privilege to see, that the decree adopts the terms of the mortgage. And if it does not, can it be contended, that there is no appeal? It may be a question, *how far* the consent was given; or when given, whether the proceeding and the case was a proper subject for a decree; and finally, as before said, how far the decree corresponds with the terms of consent. If these terms are disregarded in the decree, can it be said to be by his assent?

It cannot be assumed, that the legislature thus constructively intended to abridge a right, so fully recognized within the general chancery jurisdiction, and, as to the subject under consideration, convert that court into one of special and limited powers; thus repealing the old and time-sanctioned provision in favor of justice and right, that "any person aggrieved by a decree in chancery shall have his appeal, 1721, ch. 14, sec. 3. The motion is overruled.

MOTION OVERRULED.

## Andrew Ellicott *vs.* The United States Insurance Company.—*December* 1848

Where the only object of a decree, appointing receivers and awarding an injunction, so far as disclosed upon its face, was to provide for the safe keeping of the effects of the defendant, and to prevent any fraudulent transfer thereof; and where such decree did not state that the ulterior intent of the court was, to make an equitable distribution of the funds, and contained no direction to the receivers, to give notice to creditors to file their claims, it was Held:

That this decree imposed no restrictions upon creditors in prosecuting their claims, either at law or in equity, and a judgment subsequently recovered by a creditor, is as much a lien on the real estate of the defendant, as if the appointment of receivers had never been made.

But in equity, this lien attaches only to such interest in the real estate, as the defendant had therein at the time the receivers were appointed, and cannot be extended to the increased value of the property, resulting from payments of purchase money made thereon by the receivers.

No proceedings of the court requiring creditors to bring in their claims, for the purpose of receiving their distributive shares of the property of the defendant in the hands of the receivers, adopted *after* the rendition of the judgment, can operate retroactively to impair the validity of its lien.

A court of equity will not restrain a creditor from prosecuting his legal remedy against the personal representatives of his debtor, unless there is a decree under which the creditor has a present right to go in and prove his debt.

If the decree had stated the ulterior object of the court, in placing the effects of the defendant in the hands of receivers, to have been, that it might make an equitable distribution thereof amongst creditors, and had directed the receivers, to give the usual notice to creditors to file their claims, then any creditor who should institute or continue to prosecute a suit at law, to recover a judgment on his claim, would have been enjoined on application, and if no such application were made, the court would regard his judgment, if obtained, as an unwarrantable interference with the jurisdiction it had assumed, and reject it as a lien on the property, in the hands of the receivers.

A receiver is an officer of the court, but his appointment determines no right, nor does it affect the title of the property in any way; it will not prevent the running of limitations. His holding is the holding of the court, for him from whom the possession was taken. He is appointed on behalf of all parties, and if any loss arise from deficiency in his accounts, the estate must bear it.

The effect of his appointment, is not to oust any party of his right to the possession of the property, but merely to retain it, for the benefit of the party ultimately entitled, and when such party has been ascertained, the receiver will be considered as his receiver.

APPEAL from the Equity Side of *Baltimore* county court.

The original bill in this case was filed by *Herman Stump*, on the 24th of May 1834, against the appellees. *The United States Insurance Company*, alleging that he is the creditor of the company to a large amount, as the holder of its policies, exhibited with the bill; that the company has stopped payment, closed its operations, and is wholly unable to pay its debts, which are very large; that there has been gross mismanagement of its affairs by its president and directors, and that the conduct of said president and directors, in permitting members of the board of directors to obtain policies of the company, to an enormous amount without sufficient security to the company, has been grossly fraudulent to all the creditors of the company. The bill further states, that the company, although utterly insolvent, is giving up to the directors and others in whose misconduct or frauds, its insolvency originated, the effects of the company in payment of policies which have come to their hands, since the company stopped payment, and become notoriously insolvent; that the assignment or delivery by the company of any of its securities or effects, since it became insolvent, in payment of any policy, is an undue preference of such creditor, and operates as a fraud upon the complainant and all the other creditors of the company; that the directors knowing that the company is utterly insolvent, are yet fraudulently transferring its effects to certain favored creditors to pay their claims in full, and that if they persist in this fraudulent and inequitable course, the whole property of the company will be given to a few creditors to the exclusion of the complainant and other creditors; and that the course they pursue is, not to receive or pay any policies except for those whose securities are held by the company, which they pay in full, and thus exclude all others. The bill, then, after various special interrogatories, prays for an injunction restraining the company, its officers, servants and agents, from transferring, assigning, releasing, or in any manner disposing of, or parting with any of the property or securities of the company, and from interfering with or in any manner diminishing the property, effects or funds of said company, and also from parting with the securities on

which the complainant's policies were issued. And that an equal and equitable distribution of the effects and property of said company may be made among all its creditors; your orator prays that your honors will appoint a receiver or receivers to take into custody all the property, estate and effect, of said company, and distribute and dispose of them under the direction and authority of your honors; and that said company may be ordered, and enjoined forthwith to deliver up to said receiver or receivers, all the estate, property and effects, books, papers, securities and credits of said company, and for general relief.

The court on the same day ordered the injunction to issue as prayed, and assigned a time for the defendants to show cause why a receiver should not be appointed, to take charge of all the effects of the company, and administer the same according to justice and equity.

Upon this bill and motion for a receiver, the company filed its answer, and after much evidence offered by affidavits, in support of the motion, and various recommendations by creditors of the company, of suitable persons for receivers, the court, (ARCHER, C. J., MAGRUDER and PURVIANCE, A. J.,) on the 31st of May 1834, passed the following decree appointing receivers.

"Upon the application of the complainant and by and with the *assent of the defendant*, it is ordered, adjudged and decreed by the court, this 31st day of May 1834, that *James Harwood, John B. Howell and Walter Farnandis*, be and they are hereby appointed receivers, to take and receive the property, estate and effects of the said company." The decree then requires a bond with approved security from said receivers, in a penalty of $100,000, conditioned for the faithful discharge of their duties as receivers. "And it is further ordered and decreed, that the said *United States Insurance Company*, deliver up to the said receivers all the goods, chattels, lands, tenements, credits and effects of said company; and also all its books, papers and evidences of debts; and it is further ordered, that the said receivers institute in the name of said company or otherwise as the case may require, all suits and actions necessary, or which they may deem expedient, for the recovery of the debts

due, or other property of the said company; and that they are hereby authorised to use the name of said company in any suit or action which they may deem it expedient to institute. It is further ordered and decreed, that the injunction heretofore issued, be, and the same shall stand and remain till further order of this court. It is further ordered, that this court will require additional bonds to be given by the receivers, upon the application of the parties interested, for greater security in the discharge of their duties, should such application be made at any future stage of the cause, and there should be sufficient grounds laid for such application."

After various other proceedings in the cause, not material to this appeal, a petition was filed on the 5th of April 1835, by *John Sullivin*, and many other creditors, for the purpose of rescinding the appointment of receivers. This petition states, that the ground of appointment of the receivers was, as they are informed, the misconduct or negligence of the old president and directors, that since their appointment the old board have been removed and a new president and directors elected, and that they conceive the interests of the creditors will be promoted by rescinding the appointment of receivers, and putting the affairs of the company in the hands of the new board, for the reasons assigned.

To this petition the receivers filed a full answer, reporting all their proceedings in their office from their appointment until the time of their filing said answer in April 1835, and the court on the 23rd of May 1835, by its order and decree, dismissed the petition, from which there was an appeal to this court at June term 1835, which was dismissed by the appellants, (*Sullivin* and others,) at June term 1836.

From this period the receivers continued in their office, and in the discharge of their duties, under the order and direction of the court; and on the 1st of November 1840, they report a sale of property, which is confirmed by the court; and on the 18th of the same month, state by petition, that they will be prepared to make a dividend of the assets in hand, and pray for notice to be given to the creditors of said company, to produce their claims to them, the receivers. The court accordingly passed

on the same day an order, directing said receivers to give notice by advertisement, to the creditors of said company, to produce their claims to said receivers duly authenticated, on or before the first day of June next, in order to receive the dividends due on their respective claims.

On the 10th of September 1841, a special auditor was appointed by the court, to state the accounts in order to a distribution, who, on the 14th of October following, made his first report, recommending a dividend of 12 cents on the dollar; and on the 25th of the same month, a second special report, in which he states, that in April 1841, a claim had been filed under the order of the 18th of November 1840, requiring creditors to file their claims, by *John Glenn*, attorney for *Andrew Ellicott*, for $5000 on which a judgment had been obtained on the 21st of October 1837, by said *Ellicott*, against the *United States Insurance Company*, which with interest and costs amounted to $7249.41. At the time of filing this claim by *Mr. Glenn*, a short copy of the judgment was also filed, on which was endorsed; "This is claimed as a lien upon the real and equitable estate of this company, on lands," &c. This report further stated, that as part of the property reported as sold by the receivers, was real estate belonging to said company, amounting to more in value than said judgment, the counsel for said *Ellicott* claim to be paid the whole debt, interest and costs, and this question the auditor submits to the court. A short copy of this judgment was filed as an exhibit with this report, showing that the same was rendered at September term 1837, of *Baltimore* county court, by confession for $5000, with interest from the 30th of April 1834, and costs.

To this claim for a lien, the said receivers and others creditors of the company excepted, and state as cause of exception, that long before the rendition of said judgment, to wit: on the 30th of May 1834, all the property and effects of the said company, were, by a decree of *Baltimore* county court, placed in the hands of receivers, for the purpose of an equal distribution amongst the creditors and the defendants enjoined from intermeddling therewith, or in any manner disposing thereof, and the said property being under the control and custody of this court, as a

court of equity, no lien at law could be obtained thereon. And the receivers further excepted to this claim, because long before the rendition of said judgment, the receivers, under an order of said court, had given bond and taken possession of all the real and other estate of the said company; and said property being thus in the hands of a court of equity, no lien at law could be obtained thereon.

The facts stated in these exceptions, were admitted by the counsel for *Ellicott* to be true; and it was on the same day (25th of October 1841,) agreed by the counsel for the respective parties, that the auditor's report then made might be confirmed, and that the claimant, *Ellicott*, reserve to himself the right of claiming the full amount of his judgment, as a preferred claim, out of any further funds which might thereafter come into the hands of the receivers, and that it should be so paid, if it should be determined by the court, that it was to be paid in full as a preferred claim or lien upon the property.

According to this agreement, the court ratified the auditor's report, and the dividend was paid accordingly. No further proceedings were had in the cause until the 7th of March 1847, when *Ellicott*, the present appellant, filed his petition in the cause, setting out his claim above mentioned, at length; that it was founded on a judgment obtained by the petitioner in *Baltimore* county court, against the said *Insurance Company*, on the 21st of October 1837, for the sum of $5000, with interest from the 30th of April 1834, and costs. And the petition avers, that at the time of the recovery of said judgment, the said company was seized of real estate in the city of *Baltimore*, which was therefore bound by the lien of said judgment, and that the legal title to said real estate yet remains in the company, but that because of the appointment of the receivers under the order of the court in this cause, the petitioner was advised that he could not levy a *fi. fa.*, or other legal process of execution on said real estate, and it was therefore agreed that he should file his claim in this cause, and pray for such relief as his case required. It further states, that a part of said real estate had been sold, and the proceeds distributed amongst the creditors generally, under the agreement of October 1841, (above stated,)

that other parcels of real estate, and also personal estate are yet unsold, and that if the receivers have been in possession of the same, they must have received a large amount of rents and profits, which he claims to be bound by his lien. It then prays that the petitioner may be at liberty to proceed with his execution, or that the real and personal estate on hand may be sold by the receivers, and the proceeds applied to pay his judgment, and that the receivers may discover whether they have been in actual possession of said premises, and that they may account for the rents and profits, which they may have received or might have received, and for general relief.

The answer of the receivers to this petition was filed on the 23d of March 1847, and they answering for themselves, the company, and the creditors of the company, admit the judgment of the petitioner, and state that under the bill in this cause, filed on the 24th of May, 1834, against said company, and after answer and hearing, they were, by the order and decree of this court, passed by consent in this cause, on the 31st of May 1834, and upon the recommendation of the complainant, and the various creditors of the company, appointed receivers of all the property of the company, for the purposes and objects of the bill, and the application for a receiver or receivers therein made; that by said decree, and injunction thereon, the company was enjoined from transferring, assigning, releasing, or in any manner parting with, any of the property of the company, or in any manner interfering with or diminishing the same. They also state, that having been so appointed receivers, they duly qualified as such, on the 4th of June 1834, by giving an approved bond of that date, and immediately entered on the discharge of their duties as such, in collecting and getting possession of all the assets and property of the company; and that before the petitioner obtained his judgment, they, as receivers, had obtained possession of all the property and estate, whatsoever, of the company, and have, ever since their said appointment, continued as receivers under it; and that said decree has ever since remained in full force. They also state, that after they were so appointed and qualified as receivers, this court, having thus assumed the cus-

tody, control and administration of all the property of the company, continued to direct and control the administration of the same by various orders passed in this cause, before the petitioner obtained his judgment, to which they refer as part of their answer, more especially to the orders directing calls to be made on stockholders for instalments, and suits to be brought against delinquent stockholders, and also against certain directors of the company; to the order passed 1st of November 1834, directing the advertisement to creditors to present their claims to the receivers, and the advertisement, in pursuance thereof; to the order of the 1st. of November 1834, authorizing the receivers to complete the payment of the purchase money due on the house occupied as the office of the company; to the orders sanctioning the compromise by the receivers of claims due the company, and to the proceedings on the application to rescind the appointment of said receivers. They also aver, that before and at the time when the petitioner obtained his judgment, he had notice of said cause, and of the proceedings under which they were so appointed receivers. They further admit that they obtained possession, as part of the property of the company, of a house and lot in South street, which was bought by the company in fee for $10,000, and on which, before the appointment of receivers, the company had paid $4375, but had not obtained the legal title thereto, and that the balance of the purchase money was paid by them, the receivers, under the order of this court, as shewn by their petition, and order of the court of the 1st of November 1834; that this house and lot were afterwards sold by them, and the sale ratified by the order of the 19th of January 1841; and that as to all the rest of what is termed the real estate of the company, which came to their possession, and was held by them at the time of the judgment, they cannot without a particular examination of the file papers, state distinctly as to each parcel, what was the nature of the estate, or interest in it, held by the company, and whether leasehold or real, but will render a particular account of the same and of the rents and profits, if upon the decree upon this petition it becomes material to ascertain it. But they state that all of it, except the house and lot on South street,

was received and held by the company, and so held when the receivers got possession of it, by way of mortgage or security to the company for the payment of debts due it. They further admit the filing of petitioner's claim, under his judgment in April 1841, under the court's order directing advertisement to creditors of the 18th of November, 1840, but they deny it was filed under any agreement made with the respondents before or at the time of filing the claim, but admit the agreement of 25th of October, 1841, (above stated,) and after again averring that the court ever since their appointment as receivers, has continued to control and direct the administration of all the estate of the company, in order to its equal and rateable distribution, they refer to the court's order for distribution, and distribution made amongst creditors, rateably, under the special auditor's report of 14th of October 1841, and 21st of January 1842, subject to the above agreeement of 25th of October 1841. The answer therefore insists, that the said claim of the petitioner was not, and is not, a lien on the real estate of the company, or any part thereof, in the hands of said receivers, or upon the proceeds, or rents and profits of any part of the same, and that he is not entitled to any priority of payment thereout, and that having received his full rateable share of the assets, as distributed under the order of the court, he is not entitled to any relief.

It was then, by agreement, admitted, that the respondents had obtained possession as receivers, of all the property and estate of said company, as stated in their answer before the petitioner's judgment was obtained ; and that the petitioner had notice of this cause, and of the proceedings under which said receivers were appointed, as stated in the answer, before he obtained his judgment ; and that the petitioner's action, in which his judgment was obtained, was instituted by writ issued out of *Baltimore* county court, on the 1st of May 1834 ; and that the charter of the company shall be considered in evidence. By another agreement it was admitted, that a part, at least, of the real estate of the defendant, now held by the receivers, was held by the defendant under mortgages or pledges for the payment of debts due by the parties mortgaging or pledging the

same to the defendant, and in no other way ; that as to the residue, it is uncertain at this time whether it was held under mortgage, or pledge simply, or under a purchase, and it is agreed, that if the decision of the court on the present application, shall render such further report or answer necessary, the receivers shall be ordered to report a particular account or schedule of all the real estate of the defendant in their possession, and held by them and the said defendant, and produce the title papers thereof, and such other information as may be necessary, under the court's opinion, to dispose of this petition finally ; and that the facts in relation to the house and lot in South street are as stated in the answer.

On this petition and answer the court, (Le Grand, J.,) on the 7th of April, 1847, passed the following decree : The only question arising under this petition, is, when did the jurisdiction of this court, as a court of equity, so attach as to place the whole estate and assets of the defendant subject to the orders of distribution of this court? I have carefully examined the cases referred to in the argument of counsel, and also others, but regarding the decisions heretofore made by *Baltimore* county court, as binding on me, I do not deem it necessary to express any opinion, as to what would be my decision were the question for the first time presented.

This court has on several occasions decided, that on the appointment of the receivers, under the bill in this case, the whole control of the funds and estate of the defendant were vested in the court of equity; and as a consequence of this, it necessarily follows, under all the decisions, that no judgment obtained thereafter at law, can be entitled to a preference. It is therefore ordered, this 7th day of April 1847, that the petition of *Andrew Ellicott*, filed on the 7th of March 1847, be and the same is hereby dismissed.

From this decree *Ellicott* appealed.

The cause was argued before Dorsey, C. J., Martin and Frick, J.

By Alexander for the appellant, who insisted :

1st. That the appointment of the receivers, and other proceedings in this cause anterior to the 21st of October 1837,

did not displace the legal title of the said company, and therefore, the judgment recovered by the appellant on that day, was, at law, a lien on the lands held by the company.

2nd. That as the proceedings, anterior to the recovery of said judgment, did not transfer to the court of chancery an effectual and exclusive jurisdiction over the subject of this suit, the lien of said judgment ought to be respected and enforced in equity.

Farnandis and McMahon for the appellee, contended:

1st. That under the bill filed by *Stump* against the *United States Insurance Company*, alleging fraud, inequitable preferences, made, or intended to be made, and insolvency, and praying the injunction and appointment of a receiver, "in order to an equal and equitable distribution of all the effects and property of the company;" and by the decree, by consent passed after answer filed, granting the injunction and appointing the receivers, upon notice to, and recommendations for the office, from the creditors of the company, in all those who availed themselves of the privilege of recommending, *Baltimore* county court, as a court of equity, assumed the possession, control and disposition of all the assets of the company, in order to the equal and equitable administration and distribution of them amongst the creditors of the company, or to enable it to make the same; and that after the court obtained by its officers, the receivers, the actual possession of all the property of the company, no creditor could, by a proceeding at law against the company, obtain a lien on any part of the property, so as to give him a priority in payment out of it over other creditors, and thereby prevent the equal and equitable distribution which was the object, or within the contemplation of the said proceedings in equity.

2nd. That by said bill, and decree by consent, and by the various proceedings in said cause, of the said court, and the creditors of said company, *prior* to the petitioner's judgment; and especially the proceedings for getting in all the assets of the company, by suit or compromise, paying off liens upon the property, and reducing it into money by sale of it; for calling

in all claims against the company, under which $195,000 of said claims were actually notified to, and registered with the receivers by the creditors; and on the application to rescind the appointment of the receivers; and by the payment of all the costs of the proceeding of *Stump*, on both sides, out of the fund of the company, the said proceeding in equity was recognised and adopted by said court, and the creditors of said company, as one for the equal and equitable administration of all its assets under which all creditors were entitled to come in:—that this, the original purpose and object of the court, by its said decree and proceedings, is conclusively illustrated by its subsequent proceedings down to the dividend in 1841, all of which flowed from and depend upon the jurisdiction assumed by the court, before the petitioner's judgment; and that therefore his judgment gained him no priority.

3rd. That the judgment of the petitioner having been obtained by the *confession of the company*, was itself a breach of the injunction, if it carried with it the consequence of priority; and could therefore, give no such priority.

4th. That by the filing of his claim, under the notice to creditors to file their claims, in order to a dividend, the petitioner, (notwithstanding the endorsed reservation of his lien,) submitted himself to the jurisdiction of the court in that cause —and that, at all events, when he came in by petition in that cause, asking the aid of that court as a court of equity, and in the exercise of the jurisdiction assumed by it in that cause, to decree to him a priority by force of his said judgment, the court was not bound to allow, and ought not to have decreed him a priority alleged to have been gained by a proceeding at law, which was at war with the whole object and scope of the proceedings under *Stump's* bill, which was, in itself, a breach of the injunction on the part of the company; and which, if pushed to its fullest extent, and admitted to gain a priority, would have enabled some of the creditors to take away all the property of the debtor, not only from the numerous creditors who had made themselves parties to that proceeding, and had relied upon it for the satisfaction of their claims, but also even from the complainant, and would thus have subverted the whole objects of the proceeding.

Dorsey, C. J., delivered the opinion of this court.

The only object of the court below in the appointment of receivers, so far as it is unfolded upon the face of the decree itself, was to provide for the safe keeping of the property and effects of the *United States Insurance Company*. And the design of the injunction, awarded by the decree, was to restrain the president and directors of the company from making any fraudulent and inequitable disposition of the funds and effects of the company amongst themselves or its creditors. No other, or ulterior intent, is declared by the action of the court, anterior to the date of the judgment, rendered in the county court in favor of the appellant. The injunction gave no intimation of a design to impose restrictions upon creditors, in the prosecution of their claims against the company, either in courts of law or of equity. And to infer the existence of such restrictions, in the absence of the annunciation of any ulterior intention of the court, would work injustice to the creditors, by exposing their claims to the plea of limitations interposed, not only by the company, but by the creditors, *inter se*, in subsequent proceedings for the recovery thereof, or involving the distribution of the effects of the company.

The principle of equity, applicable to the case before us, is correctly stated in 2, *Phillips' Cases*, 22, *Rankin vs. Harwood*. "The court will not restrain a creditor from prosecuting his legal remedy against the personal representatives of his debtor, unless there is a decree, under which the creditor has a present right to go in and prove his debt." The decree in this case was passed by the consent of parties; and was far short of that which the county court, doubtless, would have passed, had it been left uncontrolled by any such assent. The proper decree for the occasion, under the circumstances of the case, should have stated the ulterior object of the court, in placing the effects of the company in charge of receivers, to have been, that it might make an equitable distribution thereof amongst the creditors of the company: and the decree should have directed the receivers to give notice to the creditors, (in the usual mode,) to file their claims with the clerk of the court. Had such a decree been made, any creditor who should institute, or

continue the prosecution of a suit at law, for the recovery of a judgment on his claim against the company, would, on application to the county court, have been enjoined from so doing. And if no such preventive interposition were invoked, and a judgment were obtained, the court would regard it as an unwarrantable interference with the jurisdiction it had assumed, and reject it as a lien on the property in the hands of the receiver.

"The appointment of a receiver does not involve the determination of any right, or affect the title of either party, in any manner whatever." 1 *Bland's, Ch. R.*, 213, *Hannah K. Chase's* case.

"A receiver is an officer of the court. He is truly and properly the hand of the court; but his appointment determines no right, nor does it affect the title of the property in any way; it will not prevent the running of the statute of limitations. The holding of the receiver, is the holding of the court for him from whom the possession was taken." 1 *Bland's, Ch. R.*, 431, *Williamson vs. Wilson.*

"A receiver appointed by this court, (a court of equity,) is appointed on behalf of all parties, and not of the plaintiff or of one defendant only; therefore, if any loss arises from deficiency in his accounts, the estate must bear it. The effect of the appointment, however, is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it; and when the party entitled to the estate has been ascertained, the receiver will be considered as his receiver." See 5, *Lib. of Law and Eq.*, 435, and the cases therein referred to.

No proceedings of the county court, requiring creditors to bring in their claims for the purpose of receiving their distributive proportions of the property of the company in the hands of the receivers, adopted after the rendition of the judgment, can operate retroactively to impair the validity of its lien. It is not pretended that any fraud or collusion was practised in obtaining the appellant's judgment against the *United States Insurance Company*. The circumstances attending it repel any such inference. The suit was instituted before any application

had been made to *Baltimore* county court, as a court of equity, for the appointment of receivers to take charge of the property and effects of the company; and the judgment subsesequently was duly obtained. It follows, from what has been hereinbefore stated, that the appellant's judgment is as much a lien on the real estate of the company, as if the appointment of receivers had never taken place. But in equity, it is only a lien on such interest in the real estate, as the company had therein at the time the receivers were appointed. To extend the lien to the increased value of the property, resulting from the payments of purchase money made thereon by the receivers, under the order of the county court, would be against all equity and conscience.

This court will sign a decree, reversing, with costs, the order of *Baltimore* county court, passed on the 7th of April, 1847, dismissing the petition of the appellant, and remanding the cause to that court, that such further proceedings may be had therein, as are consistent with the aforegoing opinion, and as the nature of the case may require.

DECREE REVERSED AND CAUSE REMANDED.

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ALFRED Y. DAY *vs.* THE STATE OF MARYLAND, ON THE SUGGESTION OF THE COMMISSIONERS OF LOTTERIES.—*December* 1848.

The 2nd section of the act of 1847, ch. 284, compelling a party, against whom proceedings may have been instituted under the act of 1846, ch. 109, for the recovery of the fines imposed by the latter act, for insuring lottery tickets, or dealing in foreign lottery tickets, to answer on oath any bill of discovery which may be filed against him in the premises by the commissioners of lotteries, in the name of the State, is a constitutional enactment.

The 3rd section of the bill of rights, furnishes no foundation for the novel proposition, that the whole common law, as then existing in *Maryland*, was made a part of the constitution, and that no part thereof could be abolished or changed by a mere act of legislation.

The 19th section of the bill of rights plainly shows, that the power was confided to the legislature, which has been exerted by it in the passage of the act of 1847, ch. 284.

Actions of debt instituted before a justice of the peace, for the recovery of the fines imposed by the act of 1846, ch. 109, are civil actions, and not criminal cases or prosecutions, and therefore the act of 1847, ch. 284, is not in conflict with the 5th article of the amendments to the constitution of the *United States*.

Appeal from the Equity Side of *Baltimore* county court.

This was a bill of discovery under the act of 1847, ch. 284, sec. 2, by the State, upon the suggestion of the commissioners of lotteries, against the appellant, filed on the 10th of April 1848, alleging, that the State, at the instance of the said lottery commissioners, had, under the act of 1846, ch. 109, instituted before a justice of the peace, for the city of *Baltimore*, six separate actions of debt against the appellant, to recover the fines imposed by said act, for the violation of the third section thereof, and that said actions are now depending before said justice for the trial thereof. The bill further states, that said actions are brought against said *Day*, for insurances of certain numbers of lottery tickets, in which illegal business he is largely engaged, and which he conducts exclusively with persons of color; and that the insurances for which said actions were brought, were made with persons of that description; and that at the time of making the same, he delivered to said parties several memorandums, exhibited with the bill, and received money from them; that said memorandums need an explanation which cannot be given by the parties to whom they were delivered, because of their incompetency as witnesses; and that it is material to the proper decision of said actions, that the said *Day* should discover, on oath, when and for what consideration, and to whom the said memorandums were given, and what is their meaning. The bill then prays for a discovery from the defendant of the true purport and meaning of said memorandums, and to what description of persons they were issued; that is to say, whether white or colored, and what consideration he received from such persons for them.

To this bill the defendant demurred, and assigned the following causes of demurrer.

1st. That the complainant hath not, in and by the said bill, stated such a case as doth or ought to entitle him to any such

discovery, as is thereby sought and prayed for from this defendant.

2nd. That the actions of debt instituted by the said State against this defendant, as stated in the said bill of discovery, are for penalties for supposed violations of the laws of this State, and that this defendant cannot therefore be held to make discovery concerning the same.

This demurrer, the court, (Le Grand, J.,) on the 22nd of May 1848, overruled, and "ordered, adjudged and decreed, that the said defendant do put in a good and sufficient answer to the said bill, on or before the 10th day of June 1848."

From this decree the defendant appealed to this court. The acts of 1846, ch. 109, and 1847, ch. 284, referred to in the proceedings in this case, are sufficiently set out in the opinion of this court.

The cause was argued before Dorsey, C. J., Spence, Martin and Frick, J.

By Wm. F. Giles, for the appellant, who contended, that it was a principle of the common law, that no man could be compelled in a criminal proceeding to give evidence against himself; to which principle the inhabitants of this State become entitled by virtue of the 3rd section of the bill of rights. That by the 19th section of the bill of rights, no man can be convicted, except there be a witness or witnesses against him, or upon voluntary confession. That the 20th section of the bill of rights, applies only to civil cases, and did not authorise the passage of the act of 1847, ch. 284; and that this act is a violation of a fundamental principle of right and justice, inherent in the nature and spirit of our social compact; and that the legislature in its passage exceeded its rightful authority; and therefore the said act is unconstitutional and void.

J. M. Campbell, for the appellee insisted, that the act of 1847, ch. 284, is warranted by the 20th section of the bill of rights.

Dorsey, C. J., delivered the opinion of this court.

By the first section of the act of 1846, ch. 109, it is enacted "that the dealing in foreign lottery tickets is absolutely pro-

hibited in this State; and any sale or other disposition of, or offer to sell, or otherwise to dispose of, any such tickets or parts of such tickets, or any substitute therefor, directly or indirectly, shall be punishable by a fine of fifty dollars for each offence, to be recovered before any justice of the peace, by action of debt, in the name of the State, instituted against the offending party, on the suggestion of the commissioners of lotteries." And the third section of the act enacts, "that all insuring of lottery tickets, or parts of lottery tickets, or numbers or certificates of numbers of lottery tickets, either foreign or domestic, is absolutely prohibited in this State; and any person directly or indirectly, making or offering, or agreeing to make any such insurance or insuring, or receiving any consideration for insuring for or against the drawing of any ticket or tickets in any lottery, whether authorised by law or not, or receiving any money, goods, or thing in action, in consideration of any agreements to repay any sum or sums of money, or to deliver the same, or any other goods or thing in action, if any ticket or tickets, in any lottery whatever, shall prove fortunate or unfortunate, or shall be drawn or not drawn, on any particular day, or in any particular order or otherwise, howsoever, or promising or agreeing to pay any sum of money, or to deliver any goods, or thing in action, or to do, or forbear to do, any thing for the benefit of any other person or persons, with or without consideration, upon any event or contingency dependent upon the drawing of any ticket or tickets, or number or numbers of any ticket or tickets in any lottery whatsoever, shall, for each of said offences be punishable as is provided by the first section of this act, in regard to the offences there described."

By the second section of the act, of 1847, ch. 284, which is a supplement to the aforementioned act of 1846, it is enacted, that "upon any proceeding for the recovery of any fine imposed by the act to which this is a supplement, the party, from whom it is sought to be recovered, shall be bound to answer on oath, any bill of discovery which may be filed against him in the premises, by the commissioners of lotteries, in the name of the State, either in the high court of chancery, or in any county court, as a court of equity." Under these enactments the

commissioners of lotteries, having, in the name of the State, instituted before a justice of the peace for the city of *Baltimore*, six several actions of debt, for the recovery of fines incurred under the third section of the act of 1846, filed a bill of discovery on the equity side of *Baltimore* county court, to obtain from the defendant certain information and disclosures in relation to certain *memoranda* issued by him, and by reason of which he had become liable for the payment of the fines, for the recovery whereof the said actions of debt were prosecuted. To this bill of discovery, the appellant interposed a general demurrer, which was overruled by the county court, and a judgment rendered against him. The only question which arose under that demurrer, in the court below, or which arises under this appeal, is, was the second section of the act of 1847, ch. 284, a constitutional enactment?

On the part of the appellant, numerous decisions have been referred to, to prove, what, in the absence of any special legislation, upon the subject, nobody denies, that at common law, no person can be compelled to give testimony, which would show that he had been guilty of a crime or misdemeanor, or subject him to any fine, penalty, or forfeiture. And that a court of equity will not compel a discovery, in aid of a criminal prosecution, or a penal action. That the legislature possessed the right of passing the enactment complained of, unless inhibited from doing so by some provision in the constitution of *Maryland*, or of the *United States*, appears not to be denied. The appellant insists that such inhibition is found in the third section of the declaration of rights; by which he asserts that the whole common law, as then existing in *Maryland*, was made a part of its constitution, and that no part thereof could be abolished or changed, by a mere act of legislation. For this novel and extraordinary proposition, it is only necessary to say, that the third section of the declaration of rights, furnishes no foundation.

The nineteenth section of the declaration of rights, which is as follows; "that no man ought to be compelled to give evidence against himself in a court of common law, or in any other court, but in such cases as have been usually practised

in this State, or may hereafter be directed by the legislature," also fails to support the position sought to be maintained by the appellant. The concluding words of the section plainly shew, that the power was confided to the legislature, which has been exerted by it, in the passage of the act of 1847.

There is no other part of the bill of rights, or constitution of *Maryland*, which the appellant can invoke to his aid, in the case before us. And there is no part of the constitution of the *United States*, which gives the slightest color to the principle, for which the appellant contends; unless it be found in that part of the fifth article of the amendments thereto, which declares, that no person "shall be compelled in any criminal case, to be a witness against himself." If the proceedings pending before the justice of the peace, be criminal prosecutions or criminal cases, then is the judgment of the county court clearly erroneous, if that clause in the constitution of the *United States*, extend to state legislation. But what are the proceedings before the magistrate, in relation to which the bill of discovery before us, has been filed? Not criminal cases or prosecutions, but civil actions, actions of debt *inter partes*, and although the object of their institution, is the recovery of fines or penalties, yet in contemplation of law, they are as much regarded as civil actions, as if instead of actions in debt, they had been actions for money, had and received. For this doctrine, see the case of *Acheson vs. Everett*, *Cowp. Rep.*, 382. The judgment and order of the county court, appealed from in this case, is affirmed.

JUDGMENT AFFIRMED.

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ADAM BODE *vs.* THE STATE OF MARYLAND.—*Dec'r* 1848.

The act of 1847, ch. 193, prohibiting the sale of spirituous liquors on the Sabbath day, was intended to embrace only the licensed tavern keepers, and the licensed retailers of the liquors and cordials therein designated.

This act has no application to the importer, who is authorised to sell spirituous liquors in the form in which they were imported, without obtaining a license from the State of *Maryland*, by force of the constitution of the *United States*, as expounded in the case of *Brown vs. The State of Maryland*, 12 *Wheat.*, 419.

The right of the State to impose the limitations and prohibitions contained in the act of 1847, upon the class of persons intended to be embraced by it, cannot be doubted.

An indictment founded upon this act will be defective, unless it describe the party accused, as a licensed tavern keeper or a licensed retailer of spirituous liquors, they being the class of persons, upon whom alone, the provisions of the act were designed to operate.

To carry into effect the intention of the legislature in framing this statute, and to enable the courts of criminal jurisdiction to execute its provisions, it is necessary to incorporate into it, by interpretation, the terms, "licensed tavern keepers, and licensed retailers."

Where a statute contains an exception, so incorporated with its enacting clause that the one cannot be read without the other, the rule of pleading is, that the indictment must negative the exception; but where, after general words of prohibition, an exception is created in a subsequent clause or section, it must be interposed by the accused as a matter of defence.

But this rule has no application to an indictment under the act of 1847. That act, by its true construction, being confined and limited, in its character and prohibitions, to a designated class, there are no exceptions to be negatived, or to be pleaded by the accused, as a matter of defence.

The provisions of this act, with respect to the forfeiture of the license of the party convicted a second time for the same offence, clearly establishes the necessity of incorporating into the indictment a description of the party charged.

ERROR to *Baltimore* city court.

The plaintiff in error, (the traverser below,) was indicted under the act of 1847, ch. 193, for selling spirituous liquors on the Sabbath day, in the form following, to wit:

"State of MARYLAND—*City of Baltimore to wit:* The jurors of the State of *Maryland*, for the body of the city of *Baltimore*, do, on their oaths, present, that *Adam Bode*, late of said city, yeoman, on the tenth day of September, in the year of our Lord eighteen hundred and forty-eight, the same day in the year aforesaid being the Sabbath day, commonly called Sunday, with force and arms at the city aforesaid, unlawfully did sell spirituous liquors to a person to the jurors aforesaid unknown, contrary to the form of the act of Assembly, in such case made and provided, and against the peace, government and dignity of the State. And the jurors aforesaid upon their oaths aforesaid, do further present, that the said *Adam Bode*, on the said tenth day of September, in the year

of our Lord eighteen hundred and forty-eight, the same day in the year aforesaid being the Sabbath day, commonly called Sunday, with force and arms, at the city of *Baltimore* aforesaid, unlawfully did dispose of spirituous liquor to a person to the jurors aforesaid unknown, contrary to the form of the act of Assembly in such case made and provided, and against the peace, government and dignity of the State."

The traverser demurred to this indictment, but the court overruled his demurrer, convicted him of the offence, and adjudged and imposed a fine of $20 and costs. To review this judgment, the writ of error in this case was sued out by the traverser.

The cause was argued before DORSEY, C. J., SPENCE, MARTIN, and FRICK, J.

By JOHN NELSON and REVERDY JOHNSON, for the plaintiff in error, and

By GEORGE R. RICHARDSON, Attorney General, for the defendant in error.

MARTIN, J., delivered the opinion of this court.

This is a writ of error directed to the city court of *Baltimore*, and brings before us the judgment of that court rendered against the plaintiff in error, upon an indictment, for violating the act of the legislature of *Maryland*, of 1847, ch. 193.

By the *first* section of this act, it is declared:

"That it shall not be lawful for any person or persons within this State, to sell, dispose of, or barter any spirituous or fermented liquors or cordials of any kind, or in any quantity whatever, on the Sabbath day, usually called Sunday, and any person or persons violating the provisions of this act shall be liable to indictment in any court of this State, having criminal jurisdiction; and upon conviction thereof shall be fined a sum not less than twenty dollars, nor more than one hundred dollars, at the discretion of the court, for the first offence, and if convicted a second time for a like offence the license of the person or persons so offending, shall be declared null and void by the judge of said court."

And by the *second* section, it is provided ;

"That it shall be the duty of the treasurer of the State, or such other person, whose duty it is to have the tavern licenses prepared, to have inserted in said licenses a clause, specially excepting the Sabbath day from the operation of said licenses."

It is perceived from an examination of this statute, that by the terms of the first section the judge, before whom the case is tried, is required, upon a conviction for a second offence, to forfeit the *license* of the party offending ; and by the second section, it is made necessary to incorporate into a tavern license a clause excepting from its operations, the Sabbath day; and it is perfectly apparent, from the character of these provisions, that the act only intended to embrace the licensed tavern keepor, and the licensed retailer of the liquors and cordials therein designated.

The act upon which this indictment was founded has no application to the importer, who is authorized to sell spirituous liquors in the form in which they were imported, without obtaining a license from the State of *Maryland*, by force of the constitution of the *United States*, as expounded in the case of *Brown* against the State of *Maryland*, 12, *Wheat.*, 419. And the point raised in the argument of the cause, with respect to the right of the State in the exercise of its police power, to restrain the importer from a desecration of the Sabbath, by an exhibition of his merchandize for sale on that day, has therefore become a mere abstract and speculative question, upon which it does not become this court to express an opinion. The probability is, that a question of this character will never be presented for the adjudication of the judicial tribunals of the country.

The right of the State to impose the limitations and prohibitions contained in the act of 1847, upon the class of persons intended to be embraced by it, cannot be doubted; and the only question to be decided by the court, is that which relates to the sufficiency of the indictment, in point of form, to authorise the judgment rendered by the court below, against the plaintiff in error.

The indictment contains two counts. The first, charges that the defendant unlawfully *sold* spirituous liquors on Sun-

day, contrary to the form of the act of Assembly; and the allegation in the second is, that the traverser unlawfully disposed of spiritous liquors on the Sabbath day, to persons unknown, &c. But in neither count, is there to be found an averment, that the plaintiff in error was at the time of the sale of the liquors in question, a tavern keeper or licensed retailer, and his counsel have insisted, that the indictment is in this respect defective, because it should have appeared on its face, that the party accused, belonged to that class of persons, upon whom alone, the provisions of the act were designed to operate.

The indictment is, we think, open to this objection. The point indeed has already been determined by the construction we have placed upon the act, under which this defendant was indicted. We have said, that according to the correct exposition of that act, it must be regarded as embracing only licensed tavern keepers and licensed retailers, and assuming this to be its true interpretation, it is perfectly clear upon the settled principles of pleading in criminal cases, that it was incumbent on the State, to bring the party charged within the purview of the statute, by a positive averment that he belonged to that class of persons, who only were restrained from selling upon the Sabbath, and against whom alone the penalties and forfeitures provided by the act, in case of its violation, were intended to be denounced. To carry into effect the intention of the legislature in framing this statute, and to enable the courts of criminal jurisdiction to execute its provisions, it is necessary to incorporate into it, by interpretation, the terms "licensed tavern keepers and licensed retailers." The act is therefore to be read as if the words were, "that it shall not be lawful for any person within this State, being a *licensed tavern keeper* or *licensed retailer*, to sell," &c.; and treating this to be the true exposition and reading of the act, the proposition is, we think, incontrovertible that the indictment should have contained on its face a distinct allegation, that the traverser was within the class of persons thus described.

In the case of *Spiers vs. Parker*, 1 *Term Rep.*, 141, it was held, "that in an action for a penalty on a statute, the plaintiff must aver a case which brings the defendant within the act."

The rule of pleading in cases, where, after general words of prohibition, exceptions are created in the enacting clause of a statute, or in a subsequent clause or section, is stated with characteristic precision by *Lord Mansfield*, in *Spiers vs. Parker*, already adverted to. He said:

"There is a settled distinction between a proviso in the description of the offence, and a subsequent exemption from the penalty under certain circumstances."

And *Ashhurst, J.*, in the same case, said:

"The rule is, that a man who will bring an action for a penalty on an act of parliament, must shew himself entitled under the enacting clause; but if there be a subsequent exemption, that is a matter of defence."

The same doctrine is announced in the case of *Steel vs. Smith*, cited by the counsel for the defendant in error, 1 *Bar. & Ald.*, 38.

*Bayly, J.*, remarked:—

"I cannot say that the proviso is a part of the same sentence, for if it had been omitted, the preceding sentence would have been entire. I admit that where there is an exception so incorporated with the enacting clause, that the one cannot be read without the other, there the exception must be negatived."

*Lord Ellenborough* held, that it was not necessary for the plaintiff to notice the exception in his declaration.

He said:—

"The sense of the enacting clause is perfectly complete, and the proviso is so distinct, that several sections might have been interposed between that and the enacting clause, without any prejudice to the sense. That there were no words of reference or of virtual incorporation, but this is a distinct and substantive proviso."

The principle enunciated by the cases to which we have been referred, is admitted, but it has no application, we think, to question of pleading raised on this indictment.

You certainly look to the language of the second section of the act, and to the concluding words of the first section, as demonstrative of the intention of the legislature to include within

its provisions only a designated class. But it is not a case where, after general prohibitory words, exemptions are carved out of the statute, either in its enacting clause or in its subsequent clauses.

This act is to be considered on its true construction, as limited in its character and prohibitions. Confined to a prescribed class. There were no exceptions to be negatived by the indictment; and it was not a case of exemption, to be interposed by the accused, as a matter of defence.

If, however, the case could be treated as an *exception* in favor of a particular class of individuals, and analogized to the adjudications on the game laws, and similar statutes, the indictment must have negatived the exception, because the exception would necessarily be incorporated into the enacting clause, as descriptive of the persons who could alone be guilty of violating the law.

The counsel for the defendant in error has contended, that the indictment is to be held sufficient, because the offence is charged in the language of the act. This is the doctrine as announced by the Court of Appeals, in the case of *The State vs. Cassel*, 2 *Har. & Gill*, 410, and in *The State vs. Dent*, 3 *G. & Johns.*, 8. As a general principle, it is unquestionably correct.

But what is the offence created by this statute, as correctly expounded? It is not the sale of spirituous liquors upon the Sabbath. It is the sale of such liquors on that day, by persons who have been licensed to deal in the sale of liquors of this description, in conformity with the laws of the State. The character and qualification of the party charged, is a necessary element in the description of the offence. It is conceded that the offence is properly charged so far as regards the *act done;* the *factum* of the sale, as the words of the statute, have been pursued. But the objection of the counsel for the plaintiff in error to the indictment, is, that the *offender* has not been described. The distinction is manifest. The court is not informed from an inspection of this indictment, that *Adam Bode* is a licensed tavern keeper, or a licensed retailer of spirituous liquors. And the fatal defect is, that the party charged was

not described as a person within the purview of the statute, and capable of perpetrating the prohibited offence.

The necessity of incorporating into the indictment a description of the party charged, is illustrated by the provisions of the act, with respect to the punishment inflicted for this offence.

For the first offence the party is subjected to a fine of not less than twenty nor more than one hundred dollars; but it is provided, "that if he is convicted a second time for a like offence, the license of the person so offending shall be declared null and void by the judge of the court." And it seems to us that it would be impossible for the court to execute this part of the law, unless it appeared upon the face of the indictment, that the party charged was a licensed tavern keeper, or a licensed retailer, and in a predicament, therefore, to be visited with the forfeiture denounced against the commission of a second offence.

It follows from the views thus expressed, that we consider the indictment as defective, and upon that ground reverse the judgment of the city court.

JUDGMENT REVERSED.

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WILLIAM MCCLELLAN *vs.* WILLIAM CROOK.—*Dec'r* 1848.

Upon a former appeal in this case, this court passed a decree reversing the decree of the chancellor, and remanding the cause to the court of chancery, with directions to sell the mortgaged premises, according to the usual course in such cases, unless the appellant should pay into that court the sum ascertained, by an audit directed to be made in this court, to be due the appellee. HELD:

That this was a final decree, disposing of the entire subject in controversy upon the pleadings and proofs exhibited, and the only authority remaining to the chancellor over the subject was, to carry that decree into execution. He was necessarily confined to the limits prescribed to him, whatever further or ulterior equity might have arisen in favor of the appellant, after the passing of the original decree by the chancellor.

This decree has become the law of the case, and the chancellor cannot otherwise deal with the matters adjudicated by it, than in the form it prescribes.

Where evidence appears upon the record of a prospective or continuing equity, of the same character as that passed upon, this court will limit itself to an exposition of the principles involved, and remand the cause, to have the account stated in chancery within those principles; but if no such evidence appears, it will pass a definitive and final decree.

Appeal from the Court of Chancery.

The original bill in this cause, was filed on the 21st of July, 1843, by *William Crook*, the present appellee, against *McClellan*, the appellant, and one *Sophia Ducatel*, administratix of *Alexis A. Delmas*, deceased, for the sale of certain real estate, in the city of *Baltimore*, mortgaged by said *Delmas*, in his life time, to one *Elizabeth Taggart*, who afterwards assigned the mortgage debt to the complainant.

The bill states, that the mortgage was executed on the 19th of November 1836, to secure an indebtedness of $2000, owing by *Delmas*, the mortgagor, to the mortgagee. That *Delmas* afterwards, executed a second mortgage of the same property to *Israel Griffith*, of the city of *Baltimore*, and shortly thereafter died, leaving the whole debt to said *Taggart* unpaid, and about one-third of the debt due said *Griffith*, also unpaid. That afterwards, on the 28th of May 1839, the complainant paid said *Taggart* the whole amount of her mortgage debt, and on the 12th of February 1840, received from her an assignment, duly executed, of said mortgage, and her interest therein. That after this assignment, viz., on the 17th of December 1842, *Griffith*, the junior mortgagee, upon a bill to which the complainant was not made a party, obtained a decree from *Baltimore* county court, as a court of equity, for the sale of the mortgaged premises, for the payment of the balance due on his mortgage claim. That under this decree, the property was sold to *William McClellan*, (the appellant,) for the sum of $1200, subject to the mortgage assigned to the complainant, of the existence of which the trustee distinctly informed *McClellan*, before and at the time of sale. The bill then prays for a sale of the mortgaged premises to satisfy the mortgage debt so assigned to the complainant, with interest, and for general relief.

The *answer* of *McClellan* admits his purchase of the property under the decree of *Baltimore* county court, and also the execution of the mortgage to *Elizabeth Taggart*, but insists that after the death of said *Delmas*, one *Victor Vallette* purchased the equity of redemption in said property, and paid said *Elizabeth* her mortgage claim, and thereby said property became and continues wholly acquitted therefrom. The

answer further insists, that if said *Crook* should be considered lawfully entitled to proceed against said property in the hands of respondent for payment of said mortgage debt, the said claim must be abated by allowance against said *Crook* for the rents of said property reasonably chargable against said *Crook*, for and by reason of his use and occupation of said property for several years past, and ever since the death of said *Delmas*. And the defendant accordingly charges, that said *Crook* has possessed and enjoyed, without paying rent therefor to any one, the said property for the period aforesaid.

The *answer* of *Sophia Ducatel*, simply denies that the said *Delmas*, to her knowledge, left any personal property whatever, or that any amount of money has come to her hands as administratrix of the deceased.

A commission was then issued under which testimony was taken, which it is not necessary to state. The auditor on the 13th of November 1844, reported two accounts, in one of which, (account A,) made under the instruction of the complainant's solicitor, he charged interest on the mortgage claim from the 19th of May 1839, to the date of the report, and credited the rent of the mortgaged property at $400 *per annum*, from the 25th of January 1843, the day when it was sold under the decree of *Baltimore* county court; leaving due the sum of $1938, with interest from the date of the report. In account B, made to meet the views of the defendant, the mortgaged estate was credited with rent from the 28th of May 1839, when the complainant became the assignee of the claim. On the 19th of the same month the auditor, at the instance of the complainant, stated another account (C,) wherein he charged the mortgaged estate with certain taxes and ground rents paid by the complainant, so that by this account there was due the complainant, the sum of $2129.80, with interest from the 13th of November 1844.

Exceptions were taken to these accounts by both parties, and the chancellor, (*Bland*,) on the 16th of December 1844, ratified and confirmed the auditor's report of the 19th of November, and the account C, accompanying the same, and decreed the property to be sold for the payment of the sum ascertained by

that account to be due the complainant. From this decree the defendant, *McClellan*, appealed, and this court, at June term 1846, ordered and directed an audit to be made in this court in conformity with its views by a special auditor appointed for the purpose, who accordingly reported account (B,) in which interest was charged upon the mortgage debt, yearly, and rent credited yearly, from the 14th of May 1839, to the 19th of November 1844, the date of the auditor's report; which was affirmed by the chancellor. The appellate court then, on the 26th of June 1846, passed a decree, reversing, with costs, the decree of the chancellor of the 16th of December 1844, and ratified and confirmed account B, stated by the special auditor under its direction, "and for the purpose of enforcing the payment of the claims therein mentioned, it is hereby further ordered, adjudged and decreed, that the said cause be and the same is hereby remanded to the court of chancery, and that unless the said *William McClellan*, the appellant, shall pay into the said court the sum of $485.49, with interest on the sum of $379.12, from the 19th of November 1844, until so brought into the said court of chancery, on or before the first day of April next, that then the said mortgaged premises be sold for the payment of the said sum and interest, under the orders and decrees of the said court of chancery, according to the usual course of the said court in such cases; and that *Samuel H. Taggart* and *St. George W. Teackle*, be, and are hereby appointed trustees to make said sale, they first giving bond to the satisfaction and approval of the chancellor, for the due execution of the trust reposed in them by this decree, and make report of such sales as usual in such cases, according to the course of the court of chancery."

The cause having been thus sent back under this decree to the court of chancery, the defendant, on the 27th of February 1847, filed his petition in the cause, alleging, that the plaintiff *Crook*, has, ever since the period to which the audit in this court is carried, (19th of November 1844,) occupied said mortgaged property without paying any rent to your petitioner, or in any wise accounting therefor to him, or being entitled to any abatement whatsoever for any ground-rent charges, or otherwise;

and has refused to leave the premises although duly warned to do so, whereby, for a long portion of the time elapsed since the said period of the said audit, said *Crook*, (as properly notified by your petitioner,) has become answerable for double rent, which your petitioner accordingly claims. Your petitioner exhibits an account of rents due from said *Crook*, whereby it appears that no part of the mortgage claim remains due to him; but on the contrary said *Crook* owes your petitioner the sum of $480.67, as of the 14th of February 1847. The petitioner then insists that the property is not liable to be sold, and prays that the sale may be stopped, and the cause again referred to the auditor.

Upon this petition the chancellor, *(Johnson,)* on the 31st of March 1847, after stating that the decree of the Court of Appeals had been filed in the cause, proceeds: "This appears to be a final decree, and simply remands the cause to this court, for the purpose of carrying the said decree into execution, and this, consequently, is the only authority which the chancellor has over the subject. It is therefore ordered that the within petition be dismissed; but, under the circumstances of the case, it is dismissed without costs."

From this decree the petitioner, *McClellan* appealed, to this court.

The cause was argued before Dorsey, C. J., Spence, Martin and Frick, J.

By Mayer, for the appellant.

The Court of Appeals in passing its decree on the former appeal in this case, did not limit itself to a declaration of the principles upon which the parties should account, but went on to have an audit made of the accounts. These could, in an appellate tribunal, allow no new testimony to be given to enlarge the basis of the account, but had necessarily to be confined to the *data* and the *dates* furnished by the case as audited, and as supplied with testimony, in the court of chancery. The difficulty encountered when the case returned to chancery, arose altogether from this court ordering an audit before itself.

instead of remanding the case, with directions comprehensive enough to embrace matters of the same character as those already passed on in the court's opinion and decree, but ulterior in account to the latest periods included in the proceedings in chancery;—as then it was not here competent for *McClellan* to show, that *Crook* continued his tenant without actually paying rent, for a long space of time after the date up to which the audit in chancery on the testimony charged him, this court's audit was narrowed to that date, and so far fell short of justice to *McClellan* upon this court's adjudicated principle in the cause, a large subsequent rent indebtedness existing to *McClellan* on *Crook's* part. The chancellor, not denying the justness of the view taken by us of this court's principle, felt constrained to dismiss the petition, because he regarded this court's decree so peremptorily restrictive, as only to require payment of the balance on this court's audit, and to exclude all further accounting in chancery in the pending cause. Under that interpetration, if we had paid money to *Crook* after the decree in chancery, and in anticipation of the account passed by this court, and enough, as the result might have showed, to extinguish what this court found due, we should have been shut out from relief, in that cause, at least. If rents accrued to us since *Crook's* occupation of the mortgaged property, how did such accrued indebtedness differ from the effect of so much money paid in satisfaction of this court's decree on the audit made here? The only question then would be, whether by petition we could claim relief; and in the cause then returned to chancery. The cause was in chancery when remanded for action by the court of chancery. It had possession of the case, even if the direction of the Court of Appeals were specific. If even the petition were not viewed as part of the original proceedings, but as a substantially new proceeding, founded on the decree and on the principles it adjudged, was it not a regular act on which relief could be claimed, as by subsequent event, and on the principle already conceded, expanded beyond the measure of this court's decree? The case then would have been analagous to that of supplemental matter, appropriate ordinarily for supplemental bill, which even after decree, may

be filed to extend the relief on the enlarged ground of merits already adjudged, which the decree has awarded; and analogous, too, to the case of a supplemental bill for carrying into execution a decree, which means to enlarge the scope of relief according to subsequent circumstances, presenting themselves after the decree, but identical with those which were *data* for the measure of the actually decreed relief. 3 *Daniels Ch. Prac.*, 157, 192. This court recognizes this petition as equivalent to a bill, even where it introduces a new party, and a distinct claim peculiar to that party. 1 *Har. & Gill*, 504, *Baltzell vs. Foss.* All then that remains for this court's deliberation, is, whether we should be driven to the cumbrous and costly formality of a bill, in place of using the direct and simple process of petition engrafted on the decree, and on the cause in possession, already and fully, of the chancery court. That point is settled by the decision of this court just referred to.

By Thomas S. Alexander, for the appellee.

On proceedings in chancery, in execution of a decree passed by the appellate tribunal, the decree passed on appeal becomes the law of the case, and binds the chancellor in regard to the entire subject of the writ. The chancellor is not at liberty to presume that the Court of Appeals has erred in regard to any question actually decided, nor can he moot any question as presented by the record, other than those which are discussed by the court above. He must take the decree passed, as a decree rightly and definitively settling every subject and every question properly presented by every subject in litigation in the suit, and therefore, in executing the decree, he must confine himself strictly within the limits prescribed to him. He must award the relief given in the very form prescribed.

I do not understand this general principle to be questioned by the appellant's counsel. His argument is, that the decree of the Court of Appeals, assumes as a principle the liability of *Crook* for rent during his occupancy; and the error in the decree, is attributed to the defect in evidence, there being no proof that *Crook* did occupy for a day after the date, which is assumed by the Court of Appeals. Upon this statement, it

appears that the decree is right, as founded upon the record. It disposes of the entire subject in controversy on the pleadings and proofs and nothing remains but to execute the decree.

The *gravamen* of the petition then is, that because of matters arising subsequent to the decree of the chancellor, and therefore not in issue at the time of the hearing of the cause by the chancellor, *McClellan* is entitled to an equity beyond that which has been awarded him. This is matter for a supplemental bill. *Mitf. Pl.*, 61, 62. *Story's Eq. Pl.*, sec. 328.

If there had been no appeal in the cause, and subsequent to the chancellor's decree, and before its execution, a new matter of equity had arisen to *McClellan*, he must have filed his supplemental bill, putting in issue the new matter, and claiming such further relief as that new matter entitled him to.

Upon appeal, the appellate tribunal is obliged to act on the record submitted to the chancellor. Is there error in the chancellor's decree? This is the question, and it is to be resolved upon the very state of pleadings and facts which were laid before the chancellor. If then, after the decree below, and prior to the decree above, new matter arises, this must of necessity, form the subject of a supplemental bill, because it cannot by any form of proceeding, be brought under consideration of the Court of Appeals.

In some cases, where the liability for a further account is apparent on the face of the record, the Court of Appeals, instead of passing a definitive decree, have limited themselves to an exposition of the principles on which the account is to be taken, and remands the cause, with directions to the court of chancery, to state the account.

In other cases, where that further liability is not sufficiently apparent, the Court of Appeals pass a final decree, and thereby compel the party to make his new matter the subject of a supplemental bill. The case of *Crapster vs. Griffith*, 6 *Har. and Johns.*, 144, is the very case now laid before the court. The claim there was for the hire of negroes, for time subsequent to the date of the auditor's report. The case decides that such hires may be recovered by a supplemental bill, and I rely on

the whole texture of the case to shew, that it is matter for a supplemental bill, and not for a petition.

Frick, J., delivered the opinion of this court.

This court at the hearing of the former appeal between these parties, having directed an audit to be made in this court, thereupon remanded the cause to the chancery court, with directions to sell the mortgaged premises according to the usual course in such cases, unless *McClellan* should pay into that court, the sum ascertained by said audit in this court, to be due to the appellee.

The appellee, (*Crook*,) had been for a series of years, tenant of the mortgaged estate; and in the audit here referred to, the rents for which he had become chargable, were credited in favor of *McClellan* against the mortgage demand of *Crook*, up to the period on which the chancellor decreed, November 19th 1844. It is now averred, that *Crook* continued to occupy the premises as tenant, subsequent to the period thus assumed by the audit in this court, and that *McClellan* is consequently entitled to credits, in reduction of the sum decreed under said audit, to be brought into the court of chancery. He accordingly files his petition in that court, shewing the amount of rents, which he claims to have accrued in his favor by *Crook's* occupancy since the allowance in said audit.

But the chancellor considering the decree of the Court of Appeals conclusive, and that his authority was limited to the execution of the decree, dismissed the petition. And the question presented upon the present appeal is, whether there is error in the opinion thus expressed by the chancellor.

This petition, can in no view, be considered as part of the original proceedings, but as substantially new matter of relief, predicated upon the principles of the decree passed by the Court of Appeals. That decree disposed of the entire subject in controversy upon the pleadings and proofs exhibited; and the cause was remanded to the chancery court, with instructions to the chancellor to enforce the decree; to direct the mortgage property to be sold, according to the usual practice of the court of chancery, unless *McClellan* within the time specified, paid into court, the sum adjudged by this court to be due. It was a final

decree of this court, upon the appeal, and the only authority remaining to the chancellor over the subject, was to carry the decree into execution. He was necessarily confined within the limits prescribed to him, whatever further and ulterior equity might have arisen in favor of *McClellan*, after the passing of the original decree by the chancellor. The grounds for this equity claimed for *McClellan* was, that *Crook* continued to occupy the mortgaged premises, beyond the day assumed by the Court of Appeals; and that the rents chargable for such subsequent occupation, ought to be allowed in reduction of the sum decreed by the Court of Appeals, because the decree admits in principle, the liability of *Crook* for rent during his occupancy. Hence it is argued that the chancellor might, on this principle settled by the Court of Appeals, have entertained the petition, and granted the relief; considering the petition as supplemental to the original case, or, even as a new proceeding submitting a continuing equity, depending on a principle already decided by this court, to belong to the relations between the parties in the cause.

But all this necessarily requires the chancellor to open the decree of this court, which as before said, was intended to be conclusive on the chancellor. He must consider that decree as rightly and definitively settling every question, properly presented to the court, and his action upon it is strictly confined within the limits presented to him.

The matter now suggested by the petition of the appellant, was not in issue at the time of the chancellor's decree, but has arisen subsequently; even if within the principles declared by the Court of Appeals. Upon the record before the chancellor, and on the questions within that record, this tribunal has acted, and passed a definite decree, in relation to the entire subject presented to the chancellor, and to this court. Thus, the whole subject then in litigation, has been finally disposed of by the decree of this court. That decree has become the law of the case, and the chancellor cannot otherwise deal with the matters thus adjudicated, than in the form prescribed.

In presenting this case, upon argument by the counsel for the appellant, it is conceded, that "the difficulty arises from an

audit and decree having been made in this court, instead of remanding the case, with directions comprehensive enough to embrace matters of the same character as those passed upon, but ulterior to the period included in the chancellor's decree." But no evidence appears in the record, of such prospective equity and occupation by *Crook*, after the date assumed as the ground of decree. Where such liability is apparent on the face of the record, the practice suggested is the true one. And in such case, the court does limit itself to an exposition of the principles involved; and remands the cause, to have the account stated in chancery, within those principles. Such was not the presentation of this case, and therefore the decree was definitive and final.

As a final decree of this court, conclusive on the chancellor, he was right in rejecting the petition; and his decision is affirmed.

DECISION AFFIRMED.

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EDWARD R. WHEELER *vs.* STATE, AT THE INSTANCE AND FOR THE USE OF MARY E. BATEMAN AND TIMOTHY A. SMITH, ADM'RS OF AQUILLA BATEMAN.—*December* 1848.

Since the act of 1825, ch. 117, a prayer, "that the plaintiffs were not entitled to recover," is too general, and for refusing to grant such a prayer, the judgment of the county court cannot be reversed on appeal to this court.

APPEAL from *Charles* county court.

This was an action of *debt*, brought on the 30th of June 1846, by the State, for the use of the appellees against the appellant, as principal, and *John G. Chapman*, as one of the sureties in a collector's bond, dated 22nd of September 1838.

*Wheeler*, the only party taken under the writ, (*Chapman* having been returned, *non est*,) appeared and pleaded general performance. The plaintiff replied, and alleged as a breach, that in the year 1840, there was allowed by the justices of the *levy court* of said county, unto *Aquilla Bateman*, who was then and afterwards register of wills of said county, the sum of

$171.33, which was assessed upon the inhabitants of said county, which the defendant collected but refused to pay over to said *Bateman* in his life time, or to the plaintiffs since his death. To this replication the defendant rejoined, denying that this allowance was made by said levy court, or assessed or collected as alleged in the replication; and upon this rejoinder, issue was joined.

At the trial the plaintiffs proved by *John R. Robertson*, a competent witness, that he is at this time clerk of the commissioners of *Charles* county, and that the books and records of the levy court came into his hands as such after the levy court was abolished, and that it appeared from the records of said levy court, which witness then held in his hands, and from which he read, that the amount mentioned in the replication was levied in 1840, by the said levy court, for the use of *Aquilla Bateman*, and that *Edward Wheeler* was collector for that year. They further proved, by *John Lawson*, a competent witness, that the bond mentioned in the declaration was executed by said *Wheeler*, on the 22nd of September 1840, and not in 1838. The defendant then prayed the court to instruct the jury that, the "plaintiffs were not entitled to recover," which instruction the court refused. The defendant excepted, and the verdict and judgment being against him, appealed to this court.

The cause was argued before Dorsey, C. J., Martin and Frick, J.

By Reeder for the appellant, and
By Causin for the appellee.

Dorsey, C., J., delivered the opinion of this court.

The only question presented for our determination by the record before us, (and that, after the repeated decisions of this court, is no question at all,) is, were the county court right in refusing to grant the defendant's prayer, as stated in his bill of exceptions, "that the plaintiffs were not entitled to recover?" So uniform and consistent have been the adjudications of this court since the passage of the act of 1852, chap. 117, that for a

county court's refusing to grant such a prayer, its judgment cannot be reversed on appeal to this court, that we do not deem it necessary to give the names of the cases in which such adjudications have been made.

The numerous other questions, which have been argued at great length by the appellant's counsel, not being presented by the record for our consideration, it would be out of place in this court to express any opinion upon them.

The judgment of the county court is affirmed.

JUDGMENT AFFIRMED.

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BENJAMIN LAWSON AND OTHERS, *vs.* DAVID DAVIS.—*December* 1848.

A bill was filed by the appellee, against his guardian, and the sureties in his guardian's bond, for an account, in which it was stated, that one of the securities in said bond was solvent. HELD, that the party had remedy at law, and the bill was dismissed.

APPEAL from the Court of Chancery.

The bill in this case, was filed on the 21st of April 1841, by the appellee, against the appellants, alleging that *Doctor David Davis*, the father of the complainant, died in *Cecil* county in 1816, leaving a widow, *Ann Davis*, and complainant, his only child and heir at law, also a considerable personal estate, upon which one *John Mercer* administered; that *Ann*, the widow and mother of the complainant, in the year 1820, intermarried with *Franklin Betts*, who was appointed guardian to complainant, by the orphans court of *Cecil* county, and entered into a bond with *Henry Lawson*, since deceased, and *William D. Mercer*, as his sureties; that said *Betts*, as such guardian, passed several accounts with the orphans court of said county, and by his sixth and last account, charged himself with a balance in his hands, of $5770.21, belonging to his *ward*, the complainant. That said *Henry Lawson* died in 1823, leaving a last will and testament, by which he appointed *Aaron Clapp* and *William H. Freemen*, his executors, and

after various pecuniary legacies, to persons specially named, bequeathed all the remainder and residue of his estate, to his brother *Benjamin Lawson*, whom he also appointed sole agent, to receive and pay the legacies above mentioned; that said executors paid over to said *Benjamin Lawson*, all said legacies, for the use of the legatees, and also in his own right as residuary devisee, the sum of $5416.10; that said *Benjamin* afterwards, in behalf of said legatees, filed a petition in said orphans court, upon which it was ordered by said court, that *George E. Walker* be received as one of the sureties of *Franklin Betts* as guardian of complainant, together with *William D. Mercer*, and that the original bond of said *Betts*, *Mercer* and *Henry Lawson*, be annulled and made void, and that the bond of *Betts*, *Mercer* and *Walker*, be approved and received in lieu thereof. The bill charges, that this order is nugatory and contrary to law; that complainant, during his minority, never received any part of his estate from his said guardian, except the items for which he claimed credit in his said accounts; that complainant arrived at age, on the 9th of March 1836, and since that time he has not received, or been able to recover from his said guardian, any part of his estate, (except a legacy of $3000,) although he has often applied for payment thereof; that *Betts* was insolvent before complainant arrived at age, and is still insolvent. That *Walker* resides in *Cecil* county, and is insolvent; that *William D. Mercer*, the other surety on said bond, resides in the same county, and is solvent. The bill then prays, that the accounts of said *Betts* may be audited, and the balance due the complainant, be struck and finally adjusted.

The guardian and his sureties, *Benjamin Lawson* and the executors and legatees, under the will of *Henry Lawson*, deceased, were made defendants to this bill.

The *answer* of *Benjamin Lawson* and other defendants, rely upon the plea of limitations, and also set up laches, and various other defences to the bill. After testimony taken under a commission, the cause was referred to the auditor, who, on the 20th of April 1841, stated an account between the defendant *Betts*, as guardian, and the complainant, by which it appeared

that said guardian was indebted to the complainant in the sum of $5661.04, with interest on $2770.51, part thereof from the date of the account.

This account, the chancellor, (Bland,) on the 25th of July 1846, ratified and confirmed; "and further adjudged, ordered and decreed, that the said defendants pay, or bring into this court to be paid to the complainant, the said sum of $5661.08, with interest on the sum of $2770.51, from the 21st day of March 1846, with costs."

From this decree the defendants, *Benjamin Lawson, Nathaniel Lawson, William Lawson, Hannah Marsh, Olivia L. Bosquet, Sarah Atterton*, and *Elizabeth H. Marsh*, appealed to this court.

The cause was argued before Dorsey, C. J., Spence, Martin and Frick, J.

By Mayer and Nelson for the appellants, and
By Stump for the appellee.

Spence, J., delivered the opinion of this court.

It is the opinion of the court in this case, that the complainant had remedy at law. The bill alleges, that *Mercer*, one of the securities in the guardian bond, is solvent. The decree is reversed with costs, and the bill dismissed.

DECREE REVERSED AND BILL DISMISSED.

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Sarah Brown and others, *vs.* Sarah R. Ramsey and others.—*December* 1848.

A testator, after various dispositions of portions of his property, directed, that after the death of his wife, the whole of his estate, real, personal and mixed, should be sold, "and the money arising therefrom to be disposed of as follows:" one hundred dollars to a charitable purpose, "and after which sum is paid, the *residue* is to be *equally divided and paid* to the following named persons, viz: To the children of my sister, *H B*, deceased, *Sarah, Levi, Deborah, Jeremiah* and *Slater*. To the children of my sister, *R R*, *Elisha, Joel, Sarah* and *Susannah*. To the children of my brother, *E E*,

deceased, *George* and *John*. To the children of my brother, *J E*, deceased, *Isaac*, two shares, *Samuel J*, and the children of his daughter, *S K*, deceased, namely, *John* and *Hannah*, share and share alike, with the exception of *Isaac's* two shares, aforementioned." HELD:

That the words, "share and share alike, with the exception of *Isaac's* two shares," are not to be confined to the last sentence, but apply to the whole clause, and that the children here mentioned are to take *per capita*, and not *per stirpes*. By dividing the fund into as many equal parts as there are legatees, counting *Isaac twice*, the proportion of each legatee is ascertained, and the distribution designed by the testator effected.

APPEAL from the Court of Chancery.

A petition was filed in chancery, on the 14th of September 1842, by *Slater Brown*, alleging the death of a certain *Joseph England*, of *Cecil* county, in 1828, seized of real and personal estate, leaving a last will and testament, duly executed on the 20th of October 1827; (a copy of which is exhibited with the petition,) of which the petitioner, together with *Joseph Townsend* and *Jeremiah Brown* were appointed executors; that his two co-executors have died, and that, although the contingency has happened, upon which the executors were authorized by the will to sell the real estate therein mentioned, yet as doubts exist whether the testator designed that the surviving executor should exercise the power of sale, which is expressly confided to their joint discretion, the interference of this court is asked to decree a sale, and appoint a trustee for that purpose, and to distribute the proceeds, under the direction of the court, according to the provisions of said will.

The testator by his will, referred to in this petition, and filed with it, bequeathed to his wife, *Hannah England*, one-half of all his personal estate, and during her natural life, one-half of the income of his real estate, with the use of certain parts of his dwelling house, and other privileges. A dwelling house, situated in the city of *Baltimore*, he devises to one *Sarah Galbraith*; the will then proceeds thus:

"*Item.* I give and bequeath to *Micah Oldham*, daughter of my sister, *Margaret Rowles*; to *Ann*, *Sarah* and *Elizabeth*, daughters of my brother *Elisha England*, by his former wife, and by his latter one, *Isaac*, *Mary*, *Joseph*, *Elisha*, *Samuel* and *Hannah*; to *Hannah Haines Kirk*, daughter of my bro-

ther, *John England*, deceased, the sum of one dollar each, to be paid to them within one year after my decease.

"*Item.* after the decease of my beloved wife, I do hereby order and direct, that the whole of my estate, real, personal and mixed, be sold to the best advantage, either at public or private sale, as my executors, hereafter named, may judge most proper, and the money arising thereon, to be disposed of as follows: the sum of one hundred dollars I give and bequeath to the asylum, lately instituted by the *Society of Friends*, near the city of *Philadelphia*, and after which sum is paid, the residue is to be equally divided and paid to the following named persons, viz:

"To the children of my sister *Hannah Brown*, deceased, *Sarah*, *Levi*, *Deborah*, *Jeremiah* and *Slater*.

"To the children of my sister *Rachel Reynolds*, *Elisha*, *Joel*, *Sarah*, *Susanna*.

"To the children of my brother, *Elisha England*, deceased, *George* and *John*.

"To the children of my brother, *John England*, deceased, *Isaac*, two shares, *Samuel J. England*, and the children of his daughter, *Sarah Kirk*, deceased, namely, *John* and *Hanna*, share and share alike, with the exception of *Isaac's* two shares, aforementioned.

"*Lastly*, I do hereby nominate, constitue and appoint my cousin, *Joseph Townshend*, of the city of *Baltimore*, my brother-in-law, *Jeremiah Brown*, and my nephew, *Slater Brown*, executors of this my last will and testament, with full and absolute power to sell and convey every part of my estate aforementioned, in legal form, hereby revoking and annulling all former wills by me made.

"In witness whereof, I have hereunto set my hand and affixed my seal, this twentieth day of the ninth month, 1827.

JOSEPH ENGLAND. (Seal.)"

Upon this petition, the chancellor, (BLAND,) on the 16th of September 1842, passed a decree, directing a sale of the farm on which the testator lived at the time of his death, and a frame dwelling house in the city of *Baltimore*, and appointed a trustee for that purpose, and directed him to "bring into this

court the bonds taken on the sale, together with the purchase money, when received, to be applied, under the chancellor's direction, after deducting costs," &c.

The first sale of the property, under this decree, was set aside by the chancellor, and a resale ordered, which was accordingly made and finally ratified by the chancellor on the 16th of February 1846, and the proceeds brought into court by the trustee, and the cause referred to the auditor, for the purpose of stating an account distributing the same.

On the 4th of June 1846, the auditor made his report accompanied by two accounts, A and B. Account A was stated on the assumption that the testator meant, that each set of children referred to should receive one-fourth of the residue of the net proceeds, to be divided between them in the manner stated in his will, which the auditor submits is the true construction thereof. Account B was stated on the assumption, that the devisees ought to take share and share alike, with the exception of *Isaac England*, to whom two shares were assigned.

Exceptions to account A were filed by *Sarah Brown*, *Levi Brown*, *Deborah Brown*, *Jeremiah Brown*, *Slater Brown*, *Isaac England*, *Samuel J. England*, *John Kirk* and *Hannah Kirk*, who approved of account B. But the chancellor, on the 10th of November 1846, overruled these exceptions, and ordered account A. to be ratified and confirmed, and directed the trustee to apply the proceeds accordingly. From this order the above named exceptants appealed to this court.

The cause was argued before Dorsey, C. J., Spence, Magruder, Martin and Frick, J.

By John C. Groome and H. McCulloch for the appellants, and

By Constable for the appellees.

Magruder, J. delivered the opinion of this court.

In the case now before us, the late chancellor, by his order, dated 10th of November 1846, ratified an account reported by the auditor, in which he distributed, in the manner therein

stated, a fund then in that court, and brought into it by one of its decrees. The appellants allege, that in the distribution of that fund they received a smaller proportion than that to which they are entitled. Whether there be any ground for this complaint depends upon the construction of one of the clauses of the will, which produced this controversy.

It appears by the record, that one *Joseph England*, by his will, bearing date the 20th day of 9th month 1827, after many dispositions of portions of his estate, directed a sale to be made of a part thereof when his wife died, and the clause in regard to the distribution of it, which gives rise to the controversy, is in these words: "After the decease of my beloved wife, I do hereby order and direct that the whole of my estate, real, and personal, and mixed, be sold to the best advantage, either at public or private sale, as my executors, hereafter named, may judge most proper, and the money arising therefrom to be disposed of as follows: the sum of one hundred dollars, I give and bequeath to the asylum, lately instituted by the *Society of Friends* near the city of *Philadelphia*, and after which sum is paid, the *residue* is to be *equally divided and paid* to the following named persons, viz.:

To the children of my sister, *Hannah Brown*, deceased, *Sarah*, *Levi*, *Deborah*, *Jeremiah and Slater*.

To the children of my sister, *Rachel Reynolds*, *Elisha*, *Joel*, *Sarah*, *Susanna*.

To the children of my brother, *Elisha England*, deceased, *George* and *John*.

To the children of my brother, *John England*, deceased, *Isaac*, two shares; *Samuel J. England*, and the children of his daughter, *Sarah Kirk*, deceased, namely, *John* and *Hannah*, share and share alike, with the exception of *Isaac's* two shares *aforementioned*."

There is no controversy in regard to the amount of the fund. The question is, what proportion is each legatee to receive? The auditor in the account which the chancellor ratified, assumes that the testator meant that each set of children should receive one-fourth of the residue of the net proceeds, to be divided between them, (each set of children.) This construc-

tion, the chancellor adopts, and a different distribution would give to the parties appealing, a larger sum than they thus obtain, hence this appeal.

"Wills," it has been said, "are hard to be understood; often, without legal advice, they are unintelligible, and with it, are of doubtful construction. Many testators fail to make themselves understood." This may be the misfortune of the present testator, or of some of the objects of his bounty. With all the consideration we have been able to give to this will, we cannot find in it the intention that this fund shall be distributed as it has been in chancery.

Some of the testator's brothers and sisters were dead. Those yet living were to receive no part of this fund. It appears by the will, that there had been, at least, one sister, (*Margaret*,) who had a daughter still in being, and yet is not admitted to a participation in this fund. With respect to the brothers and sisters thus spoken of in this clause of the will, and among whose children he distributed the fund, other clauses of the will show, that they had other children than those here provided for. Nothing like a distribution *per stirpes* is so manifest as to furnish an apology for adding or expunging words, which may be essential in order to make such a distribution. This fund is distributed by one clause of the will, and the words, "share and share alike, with the exception of *Isaac's* two shares," are not by any means to be confined to the last sentence, but seem to be introduced, because when the clause was commenced, it had not occurred to him, that "*equally divided*," was not correct, if *Isaac* was to have two shares; or it is very possible, that his determination to give to *Isaac* two shares was formed after this clause was commenced, and after, perhaps, he had (such is often the case,) excluded some, whom, when he said, "equally divided," he intended to name in the clause.

If the testator, in naming the subjects of his bounty, had not also mentioned their parents, it is scarcely to be doubted that such a distribution as the chancellor has made of the fund, would be contrary to the testator's declared intent. So if instead of inserting the names of their parents before the objects

of his bounty, the clause had said, "to *Sarah*, *Levi*," &c., naming all of them, (the children of my sister *Hannah*,) to *Elisha*, *Joel*, and other legatees, in the second sentence, (children of my sister *Rachel Reynolds*,) and in the same way, had given to his other legatees, this certainly would not have indicated an intention, that the fund should first be divided into four parts, and then each of those four parts to be distributed as the chancellor has directed. Yet it is thought this change in the structure of the sentences, would not vary the disposition of the property. Much greater liberties are often taken with the words which are to be found in a sentence of a will, but by no transposition of its words, can this will be made to direct a division of the fund, first into four equal parts, and then another division of each of those parts, into as many parts as are necessary to make the persons named in each sentence, with the exception of the last, take the same amount.

"The residue is to be equally divided," and for what purpose? The will does not say, with a view to another division, but to be "paid to the following named persons." One division then, (not two,) is to ascertain the sum, which each of those persons is to receive. We are then to look to the number of persons, who are named in this clause, as objects of the testator's bounty; we are to notice whether there be any who are to receive more than the others, and learning from the clause, that *Isaac* is to receive two shares, or twice as much as any other, and with respect to all the shares, that they are to take "share and share alike," that what is given to them is to be "*equally divided*" among them, and then by dividing the fund into as many equal parts as there are legatees, counting *Isaac* twice, we get the proportion of each. Such, it seems to the court, is the manner in which the testator designed that this fund should be distributed.

The counsel for the appellee, has given us a reference, to the case of *Alder vs. Beall*, 11 *Gill & John.*, 175. In that case the will was, that the residue of the testator's estate, should be divided "between the children," (not some, but all of them,) "of his sister *Ann*, and the children (all of them,) of his sister *Penelope*, and it was such a bequest as the testator might make

without any knowledge of the names or the number of them." No intention is expressed that the estate be equally divided, or that the legatees should take it share and share alike. It was a bequest to the children of one sister, and a bequest to the children of another sister, and one class of children, (although each of that class is to have a joint interest in so much as is bequeathed to that class,) is to have no interest in the part given to the other class.

DECREE REVERSED, AND ACCOUNT (B) RATIFIED.

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JOHN CLABAUGH AND ROBERT LANDERS, *vs.* JACOB BYERLY.—*December* 1847.

Where there are two mortgages of the same property, that which is first recorded has preference under the act of 1825, ch. 203, and a subsequent mortgagee can have no relief against a mortgage executed and recorded prior to his own, unless he can show it to be fraudulent as against him.

The principle, that equity will consider that as done which ought to be done, is an established maxim; but the court, in order to be justified in regarding an act as done, must have jurisdiction of the case, and be able to insist that it shall be done. A mere parol agreement to execute a mortgage, is one of which a court of chancery can take no notice, and, of course, cannot regard it as performed.

The recitals in a subsequent mortgage, cannot prejudice the rights of a prior mortgagee, acquired before its execution.

The rule, that a prior mortgagee, who witnesses a subsequent mortgage, without disclosing his own incumbrance, will be postponed to such subsequent mortgage, does not apply where the prior mortgage is recorded.

Mere silence is not sufficient to affect the right of the prior mortgagee. There must be actual fraud charged and proved, such as false representations, assurances of good title, or deceptive silence when information is asked. The burden of proving such fraud lies on the subsequent mortgagee.

Where a subsequent mortgagee knew of the existence of a prior mortgage at the time his own was executed, in September 1842, but made no complaint until February 1844, it was HELD, that by such a delay, he had lost his equity, if any ever existed, in his favor.

APPEAL from the Equity Side of *Carroll* county court.

The bill in this case was filed by *Jacob Byerly*, (the appellee,) against the appellants, and *Jacob Hupe* and *Henry H. Hoppe*.

on the 22nd of February 1844, for the sale of certain real estate mortgaged to the complainant by said *Hupe*.

The bill alleges that *Hupe* mortgaged the property in question, to the complainant, on the 3d of September 1842, to secure the payment of his, *(Hupe's,)* promissory note for the sum of $1160, dated 1st of September 1842, and payable to complainant, on or before the 1st of March 1844, with interest every six months from date; that no part of the principal or interest of said note, with the exception of $30, has been paid, although the time for the payment of the interest has elapsed, and due demand has been made. It further states, that previous to the mortgage to complainant, said *Hupe* mortgaged the same property to *John Clabaugh* and *Robert Landers*, by deed of mortgage dated 2nd of September 1842, to secure the payment of $192.71, and as counter security for the payment of about $400, but avers, that at the time they, *(Clabaugh* and *Landers,)* received said mortgage, and at the time it was executed, they knew that said *Hupe* had agreed to execute the mortgage to the complainant, and it was understood and agreed by *Hupe* and them, that complainant's mortgage should be executed first, and be the first lien on the property; and at the time they agreed with *Hupe* for their mortgage, they well knew that *Hupe* had agreed to secure the debt due complainant, by a mortgage on said property; and as part and parcel of the same transaction, it was agreed by all parties interested that complainant's mortgage should be executed first, and be the first lien on the property, and said *Hupe* agreed to secure said note to complainant, by mortgage, at the time it was executed; and that complainant has paid off all the claims against *Hupe* enumerated in his mortgage, and has in all respects complied with his agreement with said *Hupe*. The bill further states that the property has been levied upon by *John H. Hoppe*, the sheriff of *Carroll* county, by virtue of executions issued upon judgments recovered before either of the aforesaid mortgages, and advertised by said sheriff for sale. It then prays for a decree for a sale to satify the interest due on complainant's mortgage at the time of filing the bill, and that such decree may be allowed to stand as security for the principal when it becomes due; and

may declare complainant's mortgage to be preferred to that of *Clabaugh* and *Landers*. And that a receiver may be appointed by this court, to receive from said sheriff any money that may remain in his hands as proceeds of the sale to be made by him, after satisfying said executions in his hands, to be held by said receiver and applied under the direction of this court to the satisfaction of complainant's claim and for general relief.

Exhibit A, filed with the bill is the mortgage from *Jacob Hupe* to *Jacob Byerly*, dated the 3d of September 1842, and recorded on the 5th of the same month. It recites, that "whereas said *Hupe* is indebted to said *Byerly* in a large sum of money, about $110, and said *Byerly* has agreed to advance to said *Hupe* more money, in such manner as to render the same available to said *Hupe*, in paying off some judgments against him. That is to say," &c., (enumerating the judgments,) "it being understood that said *Byerly* is to see the above judgments paid; that is to say, go and pay them himself. And it is further agreed that said *Byerly*, having placed in the hands of *Jacob Grove* $678.41, which was to go to the payment of a judgment of *Thomas* and *Philip Baltzell* against said *Hupe*, and whereas in consideration and settlement of the above, and the above demands which said *Byerly* has on said *Hupe*, said *Hupe* gave his promissory note for $1160, dated September 1st, 1842, with interest payable every six months, which note is worded as follows, to wit: '*Carroll* county, September 1st, 1842. On or before the first day of March, eighteen hundred and forty-four, I promise to pay *Jacob Byerly*, or order, eleven hundred and sixty dollars, with interest payable every six months, for value received. Signed, *Jacob Hupe*.' And whereas it was at the time the note was given, and the settlement took place, agreed, as part of the transaction, that these presents should be executed, as a mortgage to secure the payment of said note: Now this indenture witnesseth;" &c., conveying the property, and made defeasible upon payment by *Hupe* of said note.

The bill was subsequently amended so as to charge that *Hupe* did not owe *Clabaugh* the money which the mortgage to him professed to secure, and that the said sheriff had sold

the property under said executions, for the sum of $1320, which is a much larger sum than the debt, interest and costs on all the judgments against the property, and that a large sum of money remains in the hands of the sheriff; which the bill prays may be applied in satisfaction of the complainant's claim, and for an injunction restraining said sheriff from paying the same over to said *Hupe;* which was granted.

The answer of *Hupe* denies the equities of the bill, and avers that respondent entered into an agreement to execute a mortgage to the complainant, and one *John Delaplane*, jointly, for moneys advanced, and to be advanced him, by them; to which agreement, however, *Clabaugh* and *Landers* were not in any manner privy, or parties, nor had they any knowledge whatever, thereof; that long before said agreement, he had promised and agreed with said *Clabaugh* and *Landers*, that he would execute to them a mortgage, to secure the payment of the debts due to them, and for which they were security for respondent. That complainant afterwards refused to accept a mortgage to *Delaplane* and himself jointly, and then respondent proceeded to execute the mortgage to *Clabaugh* and *Landers;* and he distinctly and positively avers, that at the time of executing said mortgage, there was no agreement whatever that he was to execute any mortgage, subsequently, to said complainant; and that there was no agreement or understanding whatever, that said mortgage to *Clabaugh* and *Landers* should be postponed, or in any way subject to a mortgage afterwards to be executed to complainant. The answer further avers, that at the time he executed the mortgage to the complainant, neither the complainant nor said *Clabaugh* or *Landers* were present, and that he executed the same at the instance of the counsel of the complainant, and not at the instance of the complainant himself; who had no knowledge whatever thereof.

The joint answer of *Clabaugh* and *Landers*, admits the execution of the mortgage to the complainant, and also the mortgage to respondents, dated 2nd of September 1842, but denies, that at the time of executing the latter mortgage, it was understood, or agreed by or between these respondents

and said *Hupe*, or the complainant, or any of them, that the said *Hupe* was to execute to complainant a mortgage to secure the payment of said note, which was to have preference to or over the mortgage executed by said *Hupe* to respondents; and they positively deny, that at the time of execution of said mortgage to them, there was any such knowledge, understanding or agreement, as is alleged in the bill; that after the execution of both mortgages, the solicitor of the complainant called on respondent, *Clabaugh*, and requested him to agree that the mortgage to complainant should have preference over respondent's mortgage, when he expressly refused to enter into any such agreement; and respondents distinctly state, that there has never been by them, or either of them, any such agreement or understanding whatever, or any other agreement in relation to said subject; and that they have always considered their mortgage as having priority over the mortgage to the complainant. The answer then proceeds to state the *bona fides* of the consideration upon which their mortgage was executed. The mortgage itself is filed as an exhibit with the answer, and bears date the 2nd of September 1842, and was recorded on the same day.

The answer of *Hoppe*, the sheriff, simply admits that he has in hand the sum of $740.62, proceeds of the property, which he is ready to pay as the court shall direct.

Upon the coming in of these answers, the court ordered the injunction to be continued until further order, and referred the cause to the auditor to state an account, settling and adjusting the respective priorities of the complainant and respondents over the fund, with directions to take testimony at the instance of either party, upon the usual notice.

Under this order it was proved before the auditor, that on the 28th of January 1842, the *Baltzell's* held a judgment against *Hupe*, for about $678.41, upon which a *fi. fa.* had been issued, and placed in the hands of *Grove*, the sheriff; and that while said *fi. fa.* was in the hands of the sheriff, *Hupe*, to save his property, induced *Byerly* to pay the sheriff the sum of $678.41, to satisfy said *fi. fa.*, upon an express stipulation and agreement that said judgment should be as-

signed to him as security for said sum. That on the 1st of September 1842, said sheriff held other writs of *fi. fa.* in favor of sundry persons, against *Hupe*, by virtue of which *Hupe's* real estate was advertised to be sold on the 1st of September 1842; and to prevent said sale, *Byerly* was induced by *Hupe* to assume upon himself, and pay said judgments, which he did upon the express stipulation and agreement, that *Hupe* would secure him by mortgage on said land.

*Jacob Root*, a competent witness, states, that on the day of sale, 1st of September 1842, he was at the house of *Hupe;* the sheriff, *Hupe*, *Clabaugh*, *John Delaplane* and *Byerly* were present. It was then agreed by *Byerly*, *Hupe* and *Delaplane*, that *Byerly* should pay up the judgments, and *Hupe* should give him and *Delaplane* a mortgage. *Clabaugh* was present when this agreement was made; the claim of *Delaplane* was for a judgment in favor of the *Frederick County Bank*, which was to have preference over that of *Byerly*.

*Nimrod Norris*, stated that a few days after the day of sale, he saw *Clabaugh*, and conversed with him on the subject. *Clabaugh* said that he was sent for to go to *Hupe's* on the day of the intended sale; that there, after conversing with the parties concerned, *Byerly* agreed to pay the different claims to the sheriff, provided *Hupe* would give him a lien on his property, which *Hupe* agreed to do, and the sale was accordingly stopped. He, *(Clabaugh,)* then called *Hupe* aside, and told him he must have some satisfaction for the notes he held; that *Hupe* agreed to give him any satisfaction he had in his power; that he, *(Clabaugh,)* agreed that *Hupe* should give him a mortgage to come in after *Byerly's* mortgage, provided there should be any funds left. That the next morning, when the parties were about to start for *Westminster*, he, *(Clabaugh,)* gave his claims to *Delaplane*, and told him, that provided *Hupe* acknowledged a mortgage to him for the security of said notes, to come in after *Byerly's* mortgage, he should bring the notes back, otherwise, to leave them in the hands of the sheriff for immediate suit. *Clabaugh*, also, at the same time, told witness, that *Delaplane* said, that when they got to *Westminster*, *Hupe* refused to execute *Byerly's* mortgage, and *Delaplane*

then drew his, *(Clabaugh's,)* mortgage, which *Hupe* executed.

*John Delaplane* states, that he wrote the mortgage executed by *Hupe* in favor of *Clabaugh* and *Landers*, on the same day it was executed, (2nd of September 1842.) *Clabaugh* and *Landers* were not present, and there was no agreement between them and *Byerly* on that day, that there was to be any other mortgage executed. It was previously understood that *Byerly* and myself were to take a joint mortgage or deed of trust, whichever *Mr. Raymond, (Byerly's* counsel,) should think best. For my part of the mortgage I was to pay a judgment to the sheriff in favor of the *Frederick* bank against *Hupe*. *Byerly* called on *Mr. Raymond*, who advised him to take a separate mortgage, which *Hupe* refused to execute. When I was drawing the mortgage to *Clabaugh* and *Landers*, I asked *Mr. Raymond*, if *Hupe* executed a mortgage on that day to *Byerly*, how it was to be inserted that his *(Byerly's)* was to have the preference? He told me that I should insert, that *Byerly* was to have the preference. I said something about it in the mortgage, but as *Hupe* refused to execute the mortgage to *Byerly* and *myself*, I struck it out before it (the mortgage to *Clabaugh* and *Landers*,) was executed.

On the 4th of June 1846 the auditor made his report, and stated an account, in which he allowed the claim of the complainant a preference over the mortgage to *Clabaugh* and *Landers*, and the court, (Brewer, J.,) on the 17th of July 1846, ratified and confirmed this audit, and ordered and decreed the sheriff to bring into court, to be paid to the complainant, the sum of $631.00, the residue of the funds in his hands. From this decree, two of the defendants, *Claubagh* and *Landers*, appealed to this court.

The cause was argued before Archer, C. J., Chambers, Spence, Magruder and Martin, J.

By Wm. P. Maulsby for the appellants, and
By Jos. M. Palmer, for the appellee.

MAGRUDER, J., delivered the opinion of this court.

The appellee in this court was the complainant in the court below. He insists that his mortgage dated the third day of September, eighteen hundred and forty-two, shall be preferred to the mortgage of the appellants, not only executed but recorded before the execution of the appellee's mortgage. The act of Assembly of 1825, chap. 203, does not give any such preference. It provides, (sect. 1st,) that in case of several deeds for the same real or personal estate, the deed which shall be first recorded according to law, shall have the preference in all courts of law and equity in this State, if the same be for valuable consideration. The same act of Assembly, in its second section, provides, that no person shall derive any advantage from the recording of a deed intended only as a security in the nature of a mortgage, unless every instrument operating as a defeasance of such deed or mortgage, or explanatory of its being designed to have the effect of a mortgage, or conditional deed, be also therewith recorded.

*Prima facie* then, the prior deed in this case, the deed to the appellants, being the deed not only first executed, but also first recorded, is to be preferred; and it would seem that the appellee has no title to relief, unless there be proof that the mortgage executed to the appellants, is for some reason or other, fraudulent and void as against the appellee. The record furnishes no proof of any such fraud, or which would warrant the court in giving relief upon such ground.

If this was a controversy between the mortgagor and the appellee, the latter might have reasons, which do not exist in this case, for complaint. But the suit is between mortgagees, all of them creditors, and to be considered as *bona fide* creditors of the mortgagor, and each of them having an unquestionable right to secure, if he can, the money due to him. All of them obtained a mortgage, and the mortgages convey the same property, to secure to each one the money due to him. The fund has proved to be insufficient to pay the several claims, and the question now is, which has, in equity, the preference?

By the appellee it is insisted that he is to be preferred, because of an agreement which the mortgagor made with him

before the date of the deed to the appellants, and upon the principle, that equity will consider that as done which ought to be done. No doubt, this, when correctly understood, is an established maxim in equity. But there are many things which a man ought to feel himself bound to do, many promises, which the party promising ought to feel himself bound to fulfil, and yet which the chancery court cannot compel him to perform. The court then, in order to be justified in regarding an act as done, must have jurisdiction of the case, and be able to insist that it shall be done. It is said that on the first September 1842, the mortgagor promised to give a mortgage, and, simply for this reason, he is to be considered as having given one on that day. Now, if this was true, how could it benefit the appellees. They would then have a mortgage one day older than that of the appellants, but in order to be entitled to a preference, it must be first recorded.

But the alleged promise is contradicted by the mortgagor, and there is no written evidence of it. The agreement, then, is one of which a court of chancery can take no notice, (see *3rd Powel*, *p.* 150,) and of course cannot regard it as performed. We are told that the promise is to be found in the deed of mortgage executed on the third of September. The recitals, however, in that deed, cannot prejudice the rights of the appellant, acquired before its execution. But the question in this suit is, not whether the mortgagor ever made a promise to the appellee, which he is bound to perform, but was there on the 2nd September 1842, any promise binding on the mortgagor, and of which the appellants were bound, or could be presumed to have notice? Of a promise made the day after the execution of the deed to the appellants, they could have had no knowledge, at the time, of the execution of that deed. In this case, too, it appears, that a mortgage has been executed and accepted by the appellee, and it would be difficult for him, in this suit, and after accepting of that mortgage, to maintain that he is entitled to another mortgage, or to interpolate into the one which he has received, other provisions.

Much has been said about the original claims against *Hupe*, the obligor. They were judgments, and some of these judg-

ments were liens on the land, and the appellee, it is thought, ought to be regarded as the assignee of them. If such was the design, the appellee ought to have taken care not to *pay* them. His contract ought to have been made, not with the debtor, but with the creditors, who, alone, could make such contracts and assignments. If the judgments could be considered as unsatisfied, and the appellee the assignee of them, it is supposed that a court of law could give him all the relief which he now seeks, and thus he would be without excuse for coming into equity.

It would seem, then, that both the act of 1825, before alluded to, and the law which previously existed, (see 2 *John's Ch. Rpts.*, 603,) would tell us that the mortgage of the appellees is not to be preferred to that of the appellants.

In the case of *Binckerhoff vs. Lansing*, 4 *John's Ch. Repts.*, 65, it is said, that "although if a prior mortgagee witnesses a subsequent mortgage, knowing its contents, without disclosing his own incumbrance, he will be postponed or barred; yet this rule does not apply, if the prior mortgage is registered." It is added, "that to affect the right of such prior mortgagee, mere silence is not sufficient. There must be actual fraud charged and proved, such as false representations, or denial upon inquiry, or artful assurances of good title, or deceptive silence, when information is asked. The burthen of proving such fraud lies on the subsequent mortgagee."

It is difficult to discover, upon what matter, to be found in this record, relief could be obtained by the appellee. According to the statement in his bill of complaint, the mortgage was to be given to secure the payment of the money due on a note dated 1st September 1842, and the mortgage which he says ought to be preferred to that of the appellants, states the consideration of that note. The sum actually due to the mortgagee at the time was about $110; the rest of the consideration was, the "said *Byerly* has agreed to advance to said *Hupe* more money, in such manner, as to render the same available to said *Hupe*, in paying off some judgments," (which are mentioned) "it being understood that the said *Byerly* is to see the said judgments paid; that is, go and pay them himself."

If there was an equity in the appellee's case, he seems to have lost it, by delaying for such a length of time to make it known. The deed which he alleges to be fraudulent against him, was executed and recorded 2nd September 1842. The appellee does not pretend that he was ignorant of its existence, or of any of its provisions. Yet, with a knowledge of this deed, he pays the money, although it does not appear that he was under any legal obligation to pay it and never seems to have complained of the deed to the appellant, until he filed his bill of complaint on the 22nd February 1844.

It seems then, that the verbal promise to execute a mortgage was principally in consideration of a verbal promise, by the creditor, to pay debts, for which, although due by the mortgagor, the mortgagee was not legally responsible. The mortgagee is presumed to have, and no doubt had a knowledge of the mortgage of the 2nd September, when he was under no legal obligation to pay any portion of those claims. It was his own fault that he afterwards undertook to pay the debts, and he cannot blame the appellants for endeavoring to secure themselves; nor can he insist that they should have forborne to take a mortgage, because of an understanding, or promise between the appellee and mortgagor, which could be enforced by neither. If, in such a case, and for anything to be found in this record, equity could decree that the mortgage first recorded should have the preference, which the act of 1825, before mentioned, gives to it, that law would become a dead letter, and the manifold evils which the law was designed to prevent, would still exist.

DECREE REVERSED.

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ROBERT WELCH, OF BEN., *vs.* EDWARD A. DAVIS.—THE STATE OF MARYLAND *vs.* EDWARD A. DAVIS.—*December* 1848.

The judgment of a county court, overruling a motion to quash a writ, is a mere interlocutory order from which an appeal will not lie.

Appeal from *Anne Arundel* county court.

The appellee in these causes, on the 23rd of June 1848, sued out of said county court, a writ of replevin, directed to the coroner of said county, commanding him to replevy certain goods and chattels, the property of the said *Davis*, in the possession of *Robert Welch*, of *Ben.*, the appellant.

The appellee being indebted to the State for rent due on a house and lot in *Annapolis*, called the "*Western Hotel*," was distrained upon for the same, and *Welch*, the defendant, was the bailiff appointed to levy the distress, which he accordingly levied upon the goods, which were replevied from his custody, by the above writ of replevin.

The defendant appeared by *James Boyle*, his attorney, and moved to quash the writ, for the following reasons:

1st. Because said writ was illegally and improperly issued. 2nd. Because the said writ could not issue to affect the rights of the State, whose bailiff the defendant was. 3rd. Because said writ was issued to replevy goods and chattels taken in distress by defendant for rent due to the said State.

It was admitted that the State distrained for rent due for a house and lot in *Annapolis*, called the "*Western Hotel*;" that *James Boyle* is the deputy attorney general of said State, for said county, and the defendant, *Welch*, the sheriff of said county, properly appointed to make the distress; and that the property called the *Western Hotel*, was purchased at sheriff's sale by the said deputy attorney general, and a deed executed therefore according to law, on or about the 20th of March 1846.

The court overruled the motion to quash, and from this order, the defendant, *Welch*, appealed.

The cause was argued before Spence, Martin, Magruder and Frick, J.

By Boyle for the appellant, and
By Stockett for the appellee.

MAGRUDER, J., delivered the opinion of this court.

These appeals, placing before us the same record, and presenting the same point, will be considered together.

The appellee sued out of *Anne Arundel* county court, a writ of replevin against *Welch*, who appeared to the suits, and moved the court to quash the writ, for the reasons assigned. The motion was overruled, and from the order overruling the motion the appeal is taken in both cases. It is quite unnecessary to state what were the the reasons assigned for this motion, as it is the opinion of this court, an appeal from such an order, cannot be entertained, at this time, by the court. It was but an interlocutory order, from which the appeal will not lie. "No appeal can be prosecuted to this court, until a decision has been had in the court below, which is so far final, as to settle and conclude the rights involved in the action, or denying to the party the means of further prosecuting or defending the suit."—"When the proceedings below shall be terminated, an appeal will then lie, and all the errors of the court below, in the progress of the cause, will be proper subjects for complaint of the party, and for the correction of this court." So said the court, in *Boteler and Belt vs. The State*, 7 *G. and J.*, 109.

If the cases were properly before us, we should not hesitate to affirm them.

APPEALS DISMISSED.

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GEORGE T. RICHARDS AND PRISCILLA, HIS WIFE, *vs.* BENJAMIN SWAN, SAMUEL SWAN, AND THEOPHILUS SWAN, INFANTS, BY JOHN HUGHES, THEIR GUARDIAN AND NEXT FRIEND.—*December* 1848.

A duly authenticated copy of a guardian's account, passed by the orphans court, is *prima facie* evidence to prove, that at the date of such account, the wards, in whose favor it was stated, were minors, and that the accountant was their guardian, and as such, owed them the amount therein stated to be due them.

A guardian passed his account in the orphans court on the 27th of June 1843, admitting therein a large indebtedness to his wards. And on the

15th of July 1844, executed a deed and bill of sale, conveying certain real and personal estate to his daughter. Upon proceedings by the wards to vacate these deeds, as fraudulent as against them and other creditors, it was HELD:

That the admissions in this account were evidence against the grantee in said deeds, though similar admissions in the answer of the guardian, might not be evidence against the said grantee, his co-defendant.

Admissions of facts, made at a time when they were not in dispute, by a person having then no interest to make false admissions, and making them to charge himself, are evidence against him, and those claiming under him by title, subsequent to such admissions.

Where the *prochein ami* of an infant dies during the prosecution of the suit, the court will appoint another.

Where a guardian has been removed by order of the orphans court, the ward may, during his minority, come into court by his next friend, and call such guardian to account.

Prior to the act of 1835, ch. 380, the general rule was, that a creditor, before he could file a bill in equity to pursue property fraudulently conveyed, must obtain, by judgment or otherwise, a lien on the property; but that act has removed the necessity of a lien as preliminary to this mode of equitable relief.

There is no ascertained rule of law which fixes and determines, what acts or declarations of a party shall, in all cases, be requisite to establish fraud. Each case must depend upon its own circumstances.

The conveyances in this case were vacated, upon proof that they embraced all the grantor's property, real and personal, were made to his daughter, who never did and never could have paid the considerations expressed in them; that at the time of executing them, the grantor was greatly in debt, and shortly afterwards applied for the benefit of the insolvent laws, returning no property in his schedule; and that the whole transaction was a scheme to defraud creditors.

APPEAL from the Court of Chancery.

The appellees (the complainants below) on the 25th of October, 1844, filed their bill on the equity side of *Charles* county court, by *Allison Roberts*, their guardian and next friend, against the appellants and one *Zachariah Dent*, praying that certain conveyances which had been made by *Dent* to the defendant, *Priscilla Richards*, might be set aside and vacated, as fraudulent against his creditors. They alleged that *Dent* had been, by the appointment of the orphans court of *Charles* county, acting as the guardian of the complainants, and in that capacity had become indebted to each of them in a large sum

of money ; that he also is indebted to other persons, by judgment and otherwise, and is greatly embarrassed in his circumstances. That, being thus embarrassed, and with a view to defraud complainants and his other creditors, the said *Dent*, on the 15th of July 1844, executed to his daughter, *Priscilla M. Richards*, a bill of sale of all his personal property, consisting of slaves, &c.; and on the same day, and with the same fraudulent purpose, conveyed to said daughter all his real estate ; that the consideration of $7000, mentioned in each of these deeds, never has been paid by either *Richards* or his wife, and that they are fraudulent and covinous. That after the execution of the deeds, the orphans court, upon application, revoked the authority of *Dent*, as their guardian, and appointed *J. Hughes*. The bill, after stating other circumstances indicative of the alleged fraud, charged that *Dent* was, at the time it was filed, a petitioner for the benefit of the insolvent laws. The prayer was, that the deeds might be set aside, as fraudulent against creditors; the complainants paid their claim, and for general relief.

The answers of *Richards* and wife deny any personal knowledge of *Dent's* indebtedness to complainants, or of his affairs and general pecuniary embarassments, or of his design, in the execution of the deeds. They allege, however, that these instruments were executed for the full considerations mentioned in them; and, as to themselves, deny all fraud. They admit that but $7000, out of the $14,000, mentioned as the consideration of the deeds, was paid. They also insist, that the complainants, if they have claims against the said *Dent*, as their guardian, should proceed upon his bond, at law, and not in equity, against the defendants, in respect of property, for which they allege they have paid, and to which they have a fair title.

The answer of *Dent* admits, that he was appointed guardian to the complainants, and gave bond for the faithful performance of his duties, as such ; the *prochein ami* of the complainants being such surety. He also admits his indebtedness to complainants, and that he is indebted to other persons ; but, that the conveyances to his daughter were made for a full and

valuable consideration, the said consideration being but $7000, and not $14,000, as expressed in the two deeds. He admits himself to be a petitioner for the benefit of the insolvent laws, yet insists that he always intended to pay the complainants, and denies the fraud imputed to him.

On the 30th of December 1844, the complainants, by *John Hughes*, filed their petition, stating, that since the commencement of the suit, the said *Allison Roberts* had departed this life, and that said *John Hughes* had been appointed and qualified as guardian in his stead ; and praying that said *Hughes* may be permitted to appear as their guardian and next friend, and prosecute the suit as such. The court (CRAIN, J.,) on the same day, passed on this petition the following order. "Ordered, that the prayer of the within petition be granted, and that *John Hughes* may appear as the guardian and next friend of *Benjamin Swan* and others, in their suit against *Zachariah Dent* and others."

The deed and bill of sale exhibited with the bill, are dated 15th of July 1844, each purporting to have been executed for the consideration of $7000, paid by *Priscilla M. Richards* to said *Dent*, and conveying to her a number of tracts or parcels of land, and several negroes, and other personal property. After various other proceedings in the cause, and its transfer to the chancery court, under the act of 1835, ch. 380, upon the hearing thereof, it appearing that the trustee of *Dent*, upon his application for the benefit of the insolvent laws, had not been made a party to the bill, the chancellor, (BLAND,) by an order of the 5th of November 1846, directed the case to stand over, with leave, by a supplemental bill or otherwise, to make said trustee a party.

And on the 28th January 1847, such a bill was accordingly filed, alleging, that upon application of said *Dent*, *George T. Richards* had been appointed his trustee and duly qualified as such, and praying subpœna against said *Dent*, *Richards* and wife, requiring them to answer such supplemental matter.

The defendants, *Richards* and wife admit, in their answer to this supplemental bill, *Dent's* application for the benefit of the insolvent laws, and the appointment of *Richards* as his

trustee ; and pray that complainants may be required to file a copy of the proceedings upon this petition, that their character may be better understood. The answer then proceeds to state, that at the execution and delivery of said conveyances, impeached as fraudulent by the original bill, they, the defendants, and each of them, were uninformed and ignorant of any intention or design, on the part of *Dent*, to hinder, delay or defraud his creditors, or any of them, or to injure, wrong or prejudice any person or persons whatever. "And the said defendant, *Priscilla*, answering for herself, says, that the conveyances were *bona fide* executed and received, so far as she is concerned, and for a full and valuable consideration paid therefor, to the said *Dent*." The defendant, *George T. Richards*, speaking as trustee, says he has no title, as such, to the property, and interposes no claim thereto. The defendant, *Dent*, not answering said supplemental bill, the omission was afterwards supplied by agreement. The complainants excepted to the answer of *Richards* and wife, on the ground that it responds to matter contained in the original bill, and insisting that defendants should have responded simply to the matter contained in the supplemental bill.

Exceptions were also filed by the defendants, (*Richards* and wife,) to the averments of the original bill.

1st. Because it was not therein shown, that the said *Dent* had violated his trust, as guardian, or wasted or misapplied the money or property of his wards, at the time of executing the deeds complained of.

2nd. That the said bill shows no title, legal or equitable, on the part of the complainants, to impeach the said deeds.

3rd. That the bill does not show the complainants to be remediless at law in the premises.

4th. That the complainants do not show that they have obtained a legal or equitable lien on the property conveyed, they being only stated to be creditors at large of said *Dent*.

5th. That the said bill does not contain a prayer for a sale of the property conveyed.

The proceedings upon *Dent's petition* for the benefit of the insolvent laws, show, that he made his application on the 23rd

of October 1844, exhibiting, a list of his creditors; that the heirs of *Benjamin Swan* were returned as creditors, to the amount of $2900, and upon allegations filed by *John Hughes*, the present guardian of complainants, the jury found that he (*Dent*) had made voluntary and fraudulent transfers of his property, prior to said application, and thereupon said petition was dismissed. The defendant, *George T. Richards*, was appointed trustee of said petitioner, at the time of said application, but no property was returned by him. It also appeared, that in June 1836, *Richards himself*, applied for the benefit of the insolvent laws. Commissions were issued, under which evidence, written and oral, was returned, the purport of which will sufficiently appear from the opinion of the chancellor, (JOHNSON,) who, on the 5th of May 1847, passed a decree, sustaining the exceptions of the complainants to the answer of *Richards* and wife to the supplemental bill, and vacating and annulling the conveyances from the defendant, *Dent*, to the defendant, *Priscilla*, dated the 15th of July 1844, as fraudulent and void, as against the complainants and others, creditors of the said *Dent*, and directed the property conveyed by them to be sold, and appointed trustees for that purpose, who were directed to give notice to the creditors of *Dent*, to file their claims in this court. Accompanying this decree, the chancellor delivered an opinion, in which, after stating the facts of the case, he proceeds as follows:

"Without going into any detailed statement of the proof, the chancellor, after a very attentive reading of it, is of opinion that the merits of the case are unquestionably with the complainants, and that they are entitled to the interposition of the court in their favor, unless such interposition is prohibited by some insuperable legal or technical difficulty. The proof in my opinion establishes the following propositions.

1. That *Dent* is now and was indebted to the complainants, his former wards, to a considerable amount, at the period of the execution of the deeds complained of, and that he was also, at the same time, indebted to other persons.

2. That in October 1844, his authority as guardian was revoked by the orphan's court, upon the application of his

sureties for counter security, one of which sureties was the party by whom the present bill was filed, as guardian to the infant complainants, and the other the party by whom, in the same capacity, the suit is now carried on.

3. That the said deeds embraced all the grantor's property, of which, or of a considerable portion of which, he retained the possession and use.

4. That in October succeeding the execution of the deeds, the grantor petitioned for the benefit of the insolvent laws, returning no property in his schedule; and,

5. I am satisfied from all the circumstances of the case, as disclosed by the evidence, that the party to whom the deeds were made, never did, or could have paid the consideration as therein contained, and that the entire transaction was a scheme to defraud, his, the grantor's, creditors.

Before adverting very briefly to the points presented in the argument of the defendant's solicitor, it may be proper to remark, that the chancellor thinks the complainants' exceptions to the answer of *Richards* and wife to the supplemental bill, are well taken and must be sustained.

He is of opinion, that though the original and supplemental bill constitute but one record, and must be so regarded at the hearing, yet, as these defendants had before answered the original bill, their answer to the supplemental bill should have been restricted to the matters stated in it, and that they had no right, under pretext of answering the supplemental, to add to or amend their answer to the original bill. 1 *Daniels, Ch. Pr.*, 456. 2 *Ib.*, 839. *Thomas vs. The Visitors of Fred'k. School*, 7 *Gill and Johns.*, 369.

The first objection urged by the defendant's solicitor is, that during the minority of the wards, no proceeding can be instituted in their names, against their defaulting guardian. But in this case the relation of guardian and ward had terminated before the commencement of the suit, and consequently the guardian's trust being personal, the infant has the same right to call him to an account, as he would have to call his representatives to an account, in case of his death. And it has been decided that in case of death the infant may sue as if he was of age. And

though an infant himself cannot call his guardian to account where the relation subsists, but must wait until he attains his majority, yet a third person may do so during the minority, for the benefit of the infant of whose interest the law is especially careful. *Eyre vs. The Countess of Shaftsbury*, 2 *Peere Williams*, 119.

The chancellor, therefore, thinks that this objection cannot be maintained. The next objection is, that the present bill, which seeks to render the property conveyed by these deeds liable for the claims of the complainant, cannot be supported unless a lien is shown, or at least, a failure of any remedy to recover the claim at law.

But the office of guardian is that of a trustee, and the general power of this court to superintend the execution of trusts, is expressly preserved by the 16th sec. of the act of 1798, ch. 101, sub. chapter 12.

It is undoubtedly true that prior to the act of 1835, chapter 380, the general rule was, that before a creditor could file a bill in equity, to pursue property fraulently conveyed, he must have qualified himself so to proceed, by obtaining a judgment with respect to real property and a judgment and *fieri facias* where personal property is to be reached: but it is equally true that there are some exceptions to the rule as shown by the case of *Birely & Holtz vs. Stanley*, 5 *Gill & Johns.*, 433, and it is possible that, as in this case, the guardian who instituted and prosecuted this suit, is the surety in the bond given by *Dent* for the faithful performance of his trust as guardian, and consequently could not himself maintain an action on the bond, at law, this case might be regarded as constituting an exception to the general rule, *Graham vs. Harris*, 5 *Gill & John.*, 490.

It is not, however, necessary to decide this question, as it seems to me clear that the 2nd section of the act of 1835, ch. 380, relieves this case from the objection, admitting that, independently of this act, it would have been fatal. The legislature by the enactment in question, have most explicitly exempted creditors from the obligation to obtain judgment, before they shall be permitted to proceed in equity to vacate fraudulent conveyances. The objection upon the ground of inconvenience

in the execution of the law, the chancellor thinks, may be readily overcome by the application of the ordinary rules and principles which govern the court in analagous cases.

This bill charges, that the deeds which it assails were of all the grantor's property, and that they were without consideration, and to hinder, delay and defraud the complainants who were his creditors, as well as his other creditors.

It prays that they may be set aside as fraudulent, that the claims of the complainants may be paid, and for general relief.

The chancellor thinks the complainants have both stated and proved a sufficient case, and will sign a decree vacating the conveyances, and appointing a trustee to sell the property."

From this decree the defendants, *Richards* and *wife* appealed to this court.

The cause was argued before Dorsey, C. J., Spence, Martin, Magruder and Frick, J.

By Robert J. Brent, for the appellants, and
By Causin and Alexander, for the appellees.

Spence, J., delivered the opinion of this court.

The argument of the appellant's solicitor in this cause, insists, that the decree of the chancellor should be reversed, "because the infancy of the complainants should have been proved, as it was material."

The account proved by *Zachariah Dent*, and passed by the orphans court of *Charles* county, on the 27th day of June 1843, a duly authenticated copy of which, from the records of said court, was filed in this cause, marked exhibit C, is *prima facie* evidence to prove, that on the 27th day of June 1843, the said *Dent* admitted, that *Benjamin Swan*, and *Theophilus Swan*, were minors, that he was their guardian, and that as guardian, he was indebted to them the amount stated in said account. The account is stated as follows, "*Benjamin Swan*, *Samuel Swan*, *Theophilus Swan*, minors, in account with *Zachariah Dent*, their guardian." It is true, exception was taken to this account, as inadmissible in evidence because of its form, and it was insisted that it was not accord-

ing to the requirements of the law, being raised, or embracing the accounts of the three minors in one statement, when they should have been separate and distinct accounts. We are not aware of any form prescribed by law, and we are well satisfied that there is no provision of law to exclude this account, as an admission, on the part of *Dent*, that he was guardian to the three *Swans*, and that as guardian, he owed them the amount, stated by him in this account to be due to them. But it was insisted that these admissions of *Dent*, were not evidence against *Richards* and wife, and as they had not admitted these facts in their answers, the admissions of *Dent*, in his answer, or otherwise, could not be evidence against them. Let it be conceded, that the admissions of *Dent* in his answer are not evidence against *Richards* and wife, it by no means follows, that his admissions, made by this account, exhibit C, are not evidence against them. *Mrs. Richards* claims title under the deed and bill of sale, sought to be set aside in this case,—under *Dent*,—which deed and bill of sale were executed on the 15th of July 1844. The admissions made in this account were made on the 27th of June 1843, nearly a year before *Dent* executed the deed and bill of sale to his daughter, *Priscilla Richards*. It certainly cannot be questioned, that admissions made by him of facts, of which he was conusant, at a time when they were not in dispute, having no interest to make false admissions, and making them to charge himself, are evidence against him, and those claiming under him, by title, subsequent to such admissions. In this account, *Dent* states these complainants are minors, that he is their guardian, and as such has received the amount, stated in this account to their credit; and as their guardian, has disbursed for them, in their maintenance, &c., the several sums of money therein charged to them, all of which he has verified on oath. It is to be remembered, that these admissions are made at a time when *Dent* is in the possession of all the estate, real and personal, embraced in the two deeds, which the bill of complaint, in this case, seeks to vacate and set aside, on the ground, that they were made and executed for the purpose of defrauding, and with the view to hinder and delay the complainants, and the other creditors of the said *Dent*, from recovering their money.

These declarations and admissions, made by *Dent* the grantor in these deeds, anterior to their execution, certainly are competent and admissible evidence of the facts they tend to prove, against *Priscilla Richards*, the grantee in said deeds. One of the appellant's points in this case, is, that there is no *prochein ami* in this suit. The allegation in the bill is, that *Dent* was the guardian of *Benjamin Swan* and *Theophilus Swan*, that the orphans court of *Charles* county, on the 22nd of October 1844, revoked his guardianship, as is shown by an extract from the record of proceedings of said court, regularly certified by the register of wills of *Charles* county. The bill in this case was filed by the complainants, by their guardian and next friend, *Allison Roberts*. The complainants, *Benjamin Swan* and *Theophilus Swan*, by *John Hughes*, their guardian and next friend, filed their petition in this cause, suggesting the death of *Allison Roberts*, their guardian and next friend, and praying, that *John Hughes* might be permitted to appear as their guardian and next friend in said suit; on which petition *Charles* county court, as a court of equity, at November term, 1844, of said court, passed the following order: "Ordered, that the prayer of the within petition be granted, and that *John Hughes* may appear as the guardian and next friend of *Benjamin Swan* and others, in their suit against *Zachariah Dent* and others." If the next friend die, the court will take upon itself to appoint another. *Lancaster vs. Thornton*, 1 *Ambler*, 398. *Bracey vs. Sandiford*, 3 *Maddox* 468. This we deem ample authority to sustain the court in this appointment, without argument on our part.

It was insisted, that during the minority, the wards could not sue for the debt due from their former guardian. Chancellor *Kent*, in *Monell vs. Monell*, 5 *Jno. Ch. R.*, 297, says, that it is too plain a proposition to stand in need of authorities; that the infant ward may come into this court by his next friend, and call his guardian to account, or require him to give better security, if the state of the case should require it. *Vide* 2 *Pr. Wms.* 119, *Eyre, vs. The Countess of Shaftsbury*. A court of chancery will interpose, if guardians give occasion to suspect their behavior. 1 *Pr. Wms.* 704. *Beaufort, vs. Berty*. In

this case now under consideration, *Dent's* guardianship had been revoked by the orphans court of *Charles* county, before this bill was filed. It was urged in the argument, that these complainants could not proceed in this form to vacate and set aside these deeds, because they had not first obtained a lien on the property, by judgment or otherwise. We concur in the opinion of the chancellor in this case, that this was the rule of law, anterior to the act of 1835, ch. 380, with some exceptions; since this act, however, the necessity of a lien as preliminary to this mode of equitable relief, is obviated. Another ground of objection taken to this decree by appellant's counsel in the argument, is, "that there is no sufficient evidence of fraud or collusion between the said *Zachariah Dent* and the *Richards*, and more especially *Priscilla Richards*, to justify the decree that was thus rendered." There is no ascertained rule of law which fixes and determines what acts or declarations of a party shall, in all cases, be required to establish fraud, but on the contrary, the badges of fraud may, and often do, vary, according to the intellectual capacity and moral depravity of the perpetrator, the end designed to be obtained, and the means by which it is to be accomplished. In this case, we concur entirely in the opinion of the chancellor, in regard to the character of the deeds from *Dent*, the father, to *Priscilla* the daughter. We are satisfied, from the circumstances of the case as disclosed by the evidence, that the party to whom the deeds were made, never did, or could have paid the consideration, as therein contained, and that the entire transaction was a scheme to defraud the grantor's creditors. The decree of the chancellor is affirmed with costs, and the case remanded for further proceedings.

DECREE AFFIRMED, AND CAUSE REMANDED.

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FRANKLIN GARDNER *vs.* MARTIN LEWIS, PERMANENT TRUSTEE OF WILLIAM HOLTON, SR.—*December* 1848.

Reports of adjudged cases, are not evidence of what is the law of the State or country in which they are pronounced. The written law of foreign

countries should be proved by the law itself, as written, and the common, customary or unwritten law, by *witnesses acquainted with the law.*

The rule of comity is overruled by positive law. If the laws of this State and another State should differ, it cannot be made a question *here* which shall prevail. Where there is no constitutional barrier, our courts are bound to observe and enforce the statutory provisions of our own State.

A nation will not suffer its own subjects to evade the operation of its own fundamental policy or laws, or to commit fraud, in violation of them, by any acts or contracts made, with that design, in a foreign country, and it will judge for itself how far it will adopt, or how far it will reject, any such acts or contracts.

*H* and *G*, citizens of *Maryland*, entered into an agreement in *Washington* city, *D. C.*, by which the former admitted an indebtedness to the latter, and agreed, that certain goods attached by the latter in *Norfolk*, *Va.*, should be the property of *G*, and directed an order to the officer, in whose custody said goods were, to deliver them to *G*; and also agreed, that certain notes then given by one *T*, in favor of *H*, should be held by *G*, for so much of said debt as the *Norfolk* goods failed to pay. *G* afterwards removed these goods and notes to *Maryland*, and an action of *trover* was instituted against him by *L*, the trustee in insolvency of *H*, (who had in the meantime applied for the benefit of the insolvent laws of *Maryland*,) alleging, that this transaction was in fraud of the creditors of *H*. HELD, that the validity of this agreement must be determined by the laws of *Maryland.*

Fraud and extortion in procuring a written agreement, if established, whether it be technically duress or not, will invalidate the instrument.

If an insolvent could himself successfully impeach an agreement transferring property, for fraud, the property remains in him, and is transferred to his trustee, who then acquires a right to sue for it, and even if the insolvent could not sue for it, being *particeps criminis*, yet the trustee may.

Whether a deed be fraudulently obtained from an insolvent, or be the result of fraud practised upon him, if thereby his creditors are defrauded, the trustee is the person to claim the property in their behalf.

By our laws, all the property of an insolvent, wherever situated, is conveyed to the trustee, and though other States may not so declare in regard to property for which the trustee brings suit in their courts, yet, if the property be brought back to *Maryland*, our courts will regard it as part of the trust fund, to which the trustee is entitled.

Where our statutes declare the deed of an insolvent fraudulent, although our courts cannot meddle with the property while without our territory, still *here*, it is regarded as part of the trust fund, and if it be brought into *Maryland*, they will entertain a suit for it, and in deciding such suit, will be governed by the statutes of *Maryland*, disregarding the *lex rei sitæ*.

It is not necessary for the trustee, in order to recover in *trover* goods fraudulently obtained from the insolvent, to pay or tender to the defendant the money he paid to the insolvent at the time when the fraudulent agreement was entered into, and as a consideration therefor.

*H*, who was in embarrassed circumstances, called a meeting of his creditors, with the approval of the appellant, one of them, for the purpose of asking an extension of credit. The appellant said he could not attend, but would send *J*, his clerk, to represent him in "the most favorable manner." At this meeting it was agreed, that nothing could be done without an inventory of *H's* property, and that he, (*H*,) should go to *Washington*, and other places where his goods were, to make out one, and *J* and the other creditors agreed, that in the *interim* (five days,) no legal proceedings should be instituted against him. HELD:

That *J*, as his agent, was authorised to enter into this agreement for the appellant, and that it was a positive contract binding upon him, and founded in a sufficient consideration, both on the part of the debtor and the other creditors; and that an attachment issued by the appellant on the goods of *H*, in *Norfolk, Va.*, the day after this agreement was made, was in fraud thereof.

When creditors assemble for such a purpose as above stated, there is a contract, *inter se*, necessarily implied, that each shall act in good faith and do nothing to frustrate the common object, a breach of which is a gross fraud.

The act of 1834, making void conveyances made by applicants for the benefit of the insolvent laws, does not apply to any case where the creditor or security receiving such conveyance, shall appear not to have notice of the condition of insolvency of the debtor.

The county court instructed the jury, that if they found that the debtor intended to transfer his property to a creditor by a certain agreement, and at the time of such agreement, he had no reasonable expectation of being exempt from liability or execution for or on account of his debts, without applying for the benefit of the insolvent laws, and that the creditor at the time had notice of the debtor's condition of insolvency, then such transfer was made under a view and intent of becoming an insolvent debtor, with intent thereby to give an undue and improper preference to such creditor, and vested in him no title to the property. HELD, that this instruction was properly granted.

When any transaction necessarily produces the effect which a statute declares fraudulent as against creditors, the court may pronounce such act fraudulent. Whatever is the necessary consequence of an act deliberately done, *that* the law presumes every man to intend.

APPEAL from *Baltimore* county court.

This was an action of *trover*, instituted by the appellee, as permanent trustee of *William Holton*, *Sen.*, on the 29th of July 1845, against the appellant, to recover certain goods and promissory notes, the property of *Holton*, the insolvent. The defendant pleaded *not guilty*, upon which issue was joined.

At the trial, the plaintiff gave in evidence, the record of *Holton's* application, for the benefit of the insolvent laws. (By this record it appears, that the application was made on

the 12th of June 1845, and that the plaintiff was regularly appointed his permanent trustee, and bonded as such, on the 14th of the same month.) The plaintiff then further proved, by said *Holton*, the insolvent, (the witness having first executed to the plaintiff, as trustee, a release of interest, which was admitted to be valid,) that in 1845, witness resided in *Baltimore*, and was engaged in selling made up clothing, and dry good merchandise. That he had branches of his establishment at *Washington city*, and *Petersburg*, *Virginia*. That in May 1845, he removed his *Baltimore* stock to *Norfolk*, *Virginia*; that on the 3rd of June 1845, finding himself embarrassed, he consulted *Mr. Hack*, a member of the *Baltimore* bar, who advised him to ask an extension of his creditors; that *Mr. Hack* with witness' assent, despatched written notices to the defendant, the plaintiff, and *Hamilton Easter*, merchants of *Baltimore*, stating that they were respectively invited to a meeting of said *Holton's* creditors, to be held at the office of said *Hack*, at 4, P. M., on the 4th of June 1845; that defendant was his largest creditor; that witness, on the morning of the 4th of June 1845, met the defendant, who said, "I have just been round to see what this meeting is about." Witness told him that he was perfectly solvent, that he only wanted time, but, if his creditors desired it, would surrender to them all his property. Defendant told witness there could be no difficulty with him, but that he was going under subpœna, as a witness, to *Cumberland*, and would leave *Baltimore* that afternoon at 4 o'clock, P. M.; that, however, he would send his clerk, *Mr. Johnson*, to the meeting, and that he would instruct *Johnson* to represent him in the most favorable terms.

That defendant, afterwards, on the same day, called at the dwelling of witness, and said that he had some business at *Canton*, and would only have time to get back in season for the cars for *Cumberland*; that it was impossible for him to attend the meeting of the creditors, but would send *Johnson* there. Defendant then advised witness to go that afternoon to *Washington*, there sell out, then to go to *Petersburg*, take an inventory, thence go to *Norfolk*, do the like there, then return to *Baltimore;* that there would be no difficulty.

That witness went to the meeting at *Mr. Hack's* office, and found there the plaintiff and *Mr. Johnson*, on the part of the defendant, and no other creditors, and *Mr. Hack*. Witness was asked, by *Mr. Johnson*, if he had any exhibit of his affairs, witness said he had none; witness is under the impression that *Johnson* said, that defendant had gone to *Cumberland*, and had sent him. Witness stated that he was entirely solvent, and asked of his creditors an extension for twelve or fifteen months. That *Lewis*, the plaintiff, said that nothing could be done without an exhibit, and so said *Johnson*. *Johnson* said that witness had better go at once to *Washington*, then to *Petersburg*, then to *Norfolk*, and make inventories; and it was calculated, by the parties present, that five days would suffice for this purpose. Witness thinks that *Mr. Hack* asked the question, if, in the *interim*, whilst witness was preparing the exhibit, they would agree, that no legal proceedings should be had, until witness had prepared the exhibit; *Johnson* and *Lewis* agreed to this; that witness went, on the afternoon of the same day, to *Washington;* that on the next morning, whilst in the *Washington* store, engaged in treating with *Tucker* for the sale of the stock there, witness' son suddenly came in, and told him that *Gardner* had been at *Norfolk* on the previous day, and attached the stock of goods there, and turned him out of the store. Witness was surprised, and told *Tucker* that he feared that this proceeding of defendant had made him insolvent, and that he would have no right to go on with the sale to *Tucker;* and with a view to advise on this subject, proposed to go to a lawyer. Tucker recommended *Mr. Hoban*, whom they went in search of, but did not find at his office. That whilst in the *Washington* store, witness saw *Gardner*, on the 5th of June, pass the door; that witness went again with *Tucker* to find *Hoban;* and on reaching his office, saw *Gardner* there, who stepped out to meet witness, that witness then said, "*Mr. Gardner*, I suppose you're come to see me?" He replied, "No sir." Then witness said: "You're come to see my goods then?" "No sir, I have come on quite a different business." Then witness said: "Then you went to *Norfolk*, to see them there — you've turned my son out of doors,

without clothing, and you've reported me as a fraudulent debtor." That witness was much excited, particularly at the treatment of his son. That *Gardner* told witness, "to command his feelings, and he had no doubt, that he could satisfy him; that he had done nothing wrong, taking a mercantile view of the transaction; that he only wanted his fair share with other creditors, and he had only seized the goods at *Norfolk*, to prevent others from doing it, and getting the advantage; that he and witness could manage it all satisfactorily; that if another attachment was issued, the goods would have to remain till November, when the summer goods would be out of season, and the winter goods eaten by moths; that he had not represented witness, as a fraudulent or absconding debtor, in the proceedings at *Norfolk*." That afterwards, on that day, (the 5th of June, *Gardner* again saw witness at the *Washington* store, having come there) with a *Mr. Washington;* that *Tucker* was present; that *Gardner* asked him for a release of the goods, taken under the attachment at *Norfolk*, and then all would be right. Witness said: "I will do what is right." Defendant said, that if *Hamilton Easter* found out the goods had been attached, he would be down upon them; that he had kept it a profound secret." That defendant then said: "I have thought of a plan, you had better sell me the goods that are here, and let me sell them to *Tucker*, that it would look better?" Witness declined this, and said, he would consult about giving the release.

After this, witness again saw *Gardner* at the *Washington* store, when he again asked him for the release. Witness told him that he had concluded to do nothing till he had consulted his creditors in *Baltimore*. Defendant insisted that the release should be given, and slapping his hand on his pocket said, "I'll be d—d if I am not cut and dried for you, and will take the property here. I know that you can sue me for it, but if it costs me five thousand dollars, I will seize the goods and they shall all perish, if you do not give me the release." Witness said he would do what was right. *Gardner* again argued and threatened, and said if there was another attachment, the goods would lie and be all ruined. *Gardner* also

demanded some of the notes of *Tucker* that were to be given for the purchase money on the sale of the *Washington* stock, and said that he did not suppose the goods attached at *Norfolk* would be sold; he hoped defendant would get them again. Witness told him the *Norfolk* goods were worth at least $5000. Defendant said that *Bloodgood* thought they were only worth $3000 to 3500; that if they were sold, the sacrifice would be such that he would not be covered, therefore he wanted some of *Tucker's* notes to protect him. *Tucker* advised me to give the release and the notes, and I finally agreed to do so. Witness' motive was this, after *Gardner* and *Washington* had left the store, at the previous interview to this last one, *Tucker* had told me that *Washington* had asked him if he had any difficulties with *Gardner*, and that *Tucker* had told *Washington* that there were none with him, but with *Mr. Holton*. *Washington* then told *Tucker* that *Gardner* had taken out a replevin for the *Washington* stock; that he *Washington* had seen him do it. At this last meeting *Mr. Hoban* had come to draw up the release. Witness signed the release drawn by *Mr. Hoban*, because witness was told, if he did not, the goods should be seized, and they should all perish. That witness gave defendant three of *Tucker's* notes, each dated 5th of June 1845, at 3, 6, and 9 months, for $300 each, without interest; that *Gardner* gave him by stipulation, $200 in cash, on the first note. This interview was at night. The examination-in-chief was here suspended, and the plaintiff proved, by another witness, the demand by the plaintiff before suit brought in July 1845, of the goods and notes claimed in this action, and that defendant replied that he had no property of the insolvent *William Holton, Sen.*, in his hands.

*Holton* was then *cross-examined*. Witness told *Gardner* he thought he was solvent, and says he thinks he was; that the papers executed in *Washington* were read to him, and he understood them; that he knew that he was not obliged to sign them, and that he had a right to dispose of the goods at *Washington* as he did.

The plaintiff further proved by *Oliver F. Hack*, the same facts in reference to the calling of the meeting of creditors as

stated by *Holton*; that no one attended but *Holton*, *Lewis* and *Johnson;* that *Johnson* said that *Gardner* was out of town, had gone to *Cumberland,* and had sent him to represent him at the meeting; that nothing was done at the meeting, as there was no statement of his affairs prepared by *Holton*. It was understood that *Holton* should go to *Washington* and *Norfolk*, and get a statement of his stock and affairs, and then it would be seen if time should be given to him. *Holton* and witness proposed that no legal proceedings should be had against him during this time, whilst making a statement, and *Lewis* and *Johnson* assented to this proposition. *Holton* said it would take five days. They all left my office under this agreement.

And the plaintiff further offered in evidence, a certified copy of the record in case of the attachment by the defendant at *Norfolk*, *Va.*, on the 4th of June 1845, by which it appears that *Gardner* in his bill praying for the attachment, stated that *Holton* was indebted to him in the sum of $2413.35, as follows; on seven notes due between the 13th of June 1845, and the 5th of December 1845, the amount of which are stated; "which said several notes, (he avers,) are now lodged in the banks of said city of *Baltimore* for collection, and your orator is unable to file them here with his bill, as he left the said city in a hurry without having time to withdraw them, but will file the same at a proper time hereafter, and in the meantime files an account of said notes, marked A." Besides these notes, the balance of said debt amounting to $233.20, is by open account. The goods were taken under this attachment, and on the 7th of June 1845, delivered to *Gardner*, by virtue of the following order filed in the cause, on a copy of the process.

"*Washington, 5th of June* 1845.

Deliver the goods mentioned and referred to in the process, of which this is a copy, to *Franklin Gardner*, or order.

Wm. Holton, Sr.

To the officer in whose charge or custody said goods are."

*Gardner* then directed the goods to be delivered to his agent, *Johnson*, who took possession of them, and gave a receipt therefor, and on the same day, (7th of June,) the cause was dismissed by order of the plaintiff's *(Gardner's,)* counsel.

The plaintiff then further proved that the notes of *Holton* in favor of *Gardner* mentioned in the above proceedings, were discounted by the *Union Bank of Maryland* for defendant, with his endorsements thereon, and were held by the said *Bank* at the time the attachment at *Norfolk* was issued, and were afterwards paid by the defendant as they fell due.

And the defendant on his part, gave in evidence by *Mr. Tucker*, that he was treating with *Holton* for the purchase of the goods at *Washington*, on the 5th of June 1845; that *Holton's* son came into the store, and told him that *Gardner* had been to *Norfolk*, and attached the stock of goods there. *Holton* then said he was not sure of his situation, and of his right to sell the *Washington* stock to witness—that this proceeding might make him insolvent. That witness proposed to advise with counsel, went for *Mr. Hoban*, and not finding him, went again, when on approaching his office, saw him there with *Gardner*, who came to the door and talked with *Holton*. *Holton* asked *Gardner* why he came to *Washington*, if it was on account of his business? *Gardner* replied, "not particularly for that, though since I am here, I can attend to that also." *Holton* invited *Gardner* to come down to the store. *Gardner* came while the appraisement was going on. *Holton* executed the paper to *Gardner*—it was drawn by *Mr. Hoban*, and attested by witness on the day it bears date; the following is the paper.

"Memorandum of an agreement, between *Franklin Gardner* and *William Holton, Sen.*, made at *Washington, D. C.*, on this 5th day of June 1845. *Mr. Holton* admits to be due *Mr. Franklin Gardner*, the sum of twenty-four hundred and thirteen dollars and thirty five cents, and hereby agrees, that the goods attached by said *Gardner* at *Norfolk*, in the State of *Virginia*, be owned by said *Gardner*, and received by him, as his own property, from the officer in whose hands they now are; and said *Gardner* agrees, that the notes of *Mr. Tucker*, given and dated this day in his favor, should be held in trust for the use of said *Holton*, in case the said property attached at *Norfolk*, pay the said debt due the said *Gardner*, when the same are disposed of by him, and only so much of said notes

shall be the said *Gardner's*, in any event, as shall remain after sale of said *Norfolk* goods, necessary to make up the amount of said debt.

FRANKLIN GARDNER,
WM. HOLTON, SR."

"Witness,—*Sam. W. Tucker.*"

There was a great deal of desultory conversation between *Gardner* and *Holton*, which witness cannot recollect. *Gardner* told *Holton* that he feared the goods at *Norfolk* would not be enough to cover his claim, and wanted notes, and that he would pay over any surplus there might be. Some high conversation occurred on this demand. *Holton* said he wished to consult his creditors in *Baltimore*, and did not know that he would be right in giving the release till then. *Gardner* would threaten when *Holton* was excited, and argue when he was calm. *Gardner* said the delay might be too great, that what was to be done, was to be done at once; that even at that very moment it might be too late, and that some creditor might have laid a second attachment on the goods at *Norfolk*. The conversation went on alternately mild and excited. *Gardner* used some harsh expressions; said he was prepared for him; that he must close up this matter; that *Holton* had brought this difficulty on himself, by calling his creditors at an attorney's office. Finally *Holton* agreed to sign the paper, at the persuasions of witness, and to give three of witnesses purchase notes, which were for $300 each, *Gardner* giving *Holton* on them $200 in cash. *Holton* signed the paper; signed it willingly; that this was about midnight.

Witness, on *cross-examination* said, *Gardner* threatened *Holton* that he would close that business up if it cost him $5000. Said he was cut and dried for him; that not an article of the *Washington* stock should be moved; that he knew *Holton* could sue him, and get damages, but he did not care. *Holton* said he was afraid the seizing at *Norfolk* had made him insolvent. The release was written on the 5th of June in witness' presence. *Holton* would get excited, when his ideas of doing justice would press upon him, and when *Gardner* would urge the giving the release.

And the defendant further proved, by *Mr. Johnson,* that witness was at *Mr. Hack's* office, where he went by direction of defendant, to see what was done; that witness was only instructed to go there and see what was done, and was not authorized to agree to any thing, and would not have felt himself authorized to agree to any terms; does not remember he entered into any stipulation or agreement to forbear proceedings; that it is some time since, and don't recollect very well, but has no remembrance of any agreement; witness got the goods from the sheriff at *Norfolk,* and brought them up to *Baltimore;* that they were sent to *Philadelphia,* and as he understood, sold there. *Gardner* did not tell witness not to enter into any arrangement; he merely told witness, that he, *Gardner,* would be absent, and witness to go there, as he, *Gardner,* could not attend.

The plaintiff then offered in evidence, the account of sales made by the defendant at *Philadelphia,* amounting to $2382.02.

And the plaintiff then offered the following prayers to the court.

1st. If the jury find from the evidence in the case, that *Holton* applied for the benefit of the insolvent laws, and obtained the same, and that plaintiff was duly and regularly appointed permanent trustee of said *Holton,* and legally bonded as such, and that before the institution of the suit, he demanded the property for which the action is brought, of defendant, and that defendant refused to deliver the same to plaintiff; and if they find that the said property was, in whole, or in part, sold by defendant, and proceeds appropriated to his own use; and if they also find, that said *Holton,* as testified by himself and *Hack,* called a meeting of his creditors at *Hack's* office, and that defendant told *Holton,* after receiving notice of such meeting, that he could not attend it, being obliged to go to *Cumberland* as a witness in a case there, but said that he would send his clerk, *Johnson,* to represent him at such meeting in the most favorable manner, and if they further find, that in consequence of which *Martin Lewis,* one of the said creditors, and *Johnson* as agent of defendant, and *Holton,* did attend, and *Johnson* said he attended for defendant because he, defendant,

had gone to *Cumberland*, and did not say, or intimate, that he was not authorized to act for defendant; and if they further find, that it was stated at the meeting, by *Johnson*, that nothing could be then done until *Holton* could make an exhibit of his affairs, and it was agreed, at *Johnson's* instance, that *Holton* should go to *Norfolk* and other places where his goods were, and make inventories of the same, and that no legal proceedings should be had until such inventories were made, and an exhibit was made of his condition by *Holton;* and if they find that defendant, after getting notice of said meeting, when he had his said interview with *Holton*, and when he directed *Johnson* to attend the said meeting of creditors, intended to go to *Norfolk* to attach the property of *Holton* there, and did go for that purpose, and did then attach them, as appears in the evidence, and designedly concealed his intention from said *Holton* and the creditors, under the notice aforesaid, and for that purpose falsely represented that he was going to *Cumberland;* and if they further find, that having attached the said property at *Norfolk*, he went to *Washington*, and there obtained, in the manner stated in the evidence of *Holton*, the order for the *Norfolk* goods and *Tucker's* notes, then the plaintiff is entitled to recover.

2nd. If the jury find the same facts as stated in the preceding prayer, as to the application of the insolvent, the appointment of the trustee, conversion by defendant, and demand and refusal; and if they further find, that at the time *Holton*, in the manner stated in the evidence of *Holton* and *Tucker*, agreed to transfer and assign said property to defendant, and did so transfer and assign, in the manner and under the circumstances stated in the evidence of *Holton* and *Tucker*, on account of the debt due by *Holton* to defendant, he, *Holton*, had no reasonable expectation of being exempted from liability or execution for, or on account of his debts, without applying for the benefit of the insolvent laws of the State, and that defendant had then, notice of the said condition of insolvency of said *Holton*, that then such transfer and assignment was made, under a view, or under an expectation, on the part of *Holton*, of being or becoming an insolvent debtor, and with

intent thereby to give an undue and improper preference to defendant, and therefore vested no title in said property in defendant; and if they further find, that when *Holton* became the debtor of defendant, he and defendant were citizens residing in *Maryland*, and have continued to be such up to the present time, and plaintiff is, in consequence, entitled to recover.

The defendant then offered the following prayers.

1st. If the jury shall find from the evidence, that on the 4th of June 1845, *William Holton, Sen.*, was indebted to *Franklin Gardner*, the defendant, in the sum of $2413.35, upon note and open account, or that the defendant was responsible for said amount in part, on account of said *Holton*, as his endorser, and was a creditor of said *Holton*, for the balance of said sum; and that on the 4th of June 1845, said defendant caused an attachment to issue, out of the circuit superior court of law and chancery, for the city of *Norfolk*, in the State of *Virginia*, against the moneys, debts and effects of said *William Holton, Sen.*, who was then residing in the city of *Baltimore* and State of *Maryland*, that in virtue of said process of attachment, the goods of said *Holton*, in the city of *Norfolk*, which are mentioned in the declaration of the plaintiffs in this suit, were seized by the sheriff of said city of *Norfolk* in the State of *Virginia*; and that whilst so in the custody of the said sheriff, under said process, on the 5th of June 1845, the said *Holton*, at *Washington*, in the *District of Columbia*, executed the agreement of that date offered in evidence, and the order contained in the record of proceedings, offered in evidence by the plaintiff; that in virtue of said agreement and order, the said goods were taken into the possession of the defendant, and that the same were sold by said defendant, for a sum netting less than the debt so due by the said *Holton* to said defendant, that then the said plaintiff is not entitled to recover in this action in respect to said goods.

2nd. If the jury find that said *Holton* was indebted, as shown in the testimony, to the defendant, and that to enforce payment of the said debt, the judicial proceeding was instituted, as given in evidence by the plaintiff, and that thereunder the

goods, the value of which is claimed in this action, were attached, and in the hands of the proper officer, to answer the claim of the defendant, and that said proceeding was afterwards dismissed, by reason of the delivery in *Virginia* to the defendant, of said goods, with the assent of the said *Holton*, and in pursuance of the agreement between *Holton* and the defendant, executed at *Washington*, in the *District of Columbia*; and if they shall find that said agreement was so executed, and while said proceeding was pending, then the plaintiff is not entitled to recover in respect of said goods, notwithstanding the jury should believe, that the said agreement and assent were procured by urgency of the defendant, and by threats of taking the goods of the said *Holton* at *Washington*, spoken of in the testimony in the case.

3rd. If the jury find that said *Holton* was indebted, as stated in the aforegoing prayer, and that to secure payment of said indebtedness, the said *Holton* executed, at *Washington*, in the district aforesaid, at the date thereof, the agreement given in evidence by the defendant, and that the notes for which, in part, this action is brought, are the notes mentioned in said agreement, and were delivered to said defendant for security, as aforesaid, at *Washington* aforesaid, at or before the making of said agreement, then the plaintiff is not entitled to recover, as to the notes, although the jury shall find that said agreement, and said delivery of the notes, were procured by the defendant by urgency and threats, as stated in the aforegoing prayer.

The court, (Le Grand, J.,) granted the prayers of the plaintiff, and rejected those of the defendant, who excepted, and the verdict and judgment being against him, appealed to this court.

The cause was argued before Dorsey, C. J., Spence, Martin and Frick, J.

By Nelson, Mayer, and McMahon, for the appellant, and
By Wallace and Johnson for the appellee.

MAGRUDER, J. delivered the opinion of this court.

The appellee in this case was appointed permanent trustee of *William Holton, Sen.*, an insolvent debtor, on the 14th June 1845, and on the 29th July of the same year, instituted this action in *Baltimore* county court. It is an action of trover, brought to recover the value of goods and promissory notes, which, it is alleged, are the property of the appellee, and had been converted, by the appellant, to his own use. There was a verdict for the appellee, and the record contains exceptions, by the appellant, to two instructions given by the court, at the instance of the appellee, and because of a refusal, by the court, to give three instructions, as asked by the appellant himself.

It appears, from the statement in the bill of exceptions, that this is a controversy between two persons, each claiming to derive title to the property in dispute, from the same person (the insolvent;) both agree that on the 4th June 1845, *Holton* was the owner of the goods and promissory notes, and it appears, continued the owner until the appellee was appointed his trustee, and the title vested in him, unless, before then, the appellant himself had acquired a valid title to the things in controversy, from the insolvent himself. The plaintiff below made out his case, and all the doubt arising in it, is caused by the introduction into it, of the proof of title by the defendant. That title is impeached, and if successfully, then, the defendant has no right. It seems proper, then, to examine the questions in regard to that title, as presented by the prayers of the defendant below.

Before doing this, however, it is necessary to dispose of a question, which, although it is not expressly raised in any of the exceptions, meets us at every point in the case, and perhaps, would materially influence the decision of the case.

The defendant below insists, that the validity of his title depends, not upon the law of *Maryland*, but upon the law of *Virginia;* and with respect to a part of the property, on the law of the *District of Columbia,* inasmuch as the agreement which constitutes his defence, transfers property, at the time, without the territorial limits of *Maryland*, (most of it in *Virginia,)* and is an agreement between persons, who, although at the time, citizens of and residents in *Maryland*, were without

its limits. For these reasons, the validity of it depends, with respect to the goods, upon the law of *Virginia;* and so far as it relates to the notes, upon the law of the *District of Columbia;* no part of it upon the law of *Maryland.* It is contended, moreover, by him, that, according to the laws of *Virginia,* and of the *District of Columbia,* the proof furnished by him establishes a valid transfer, by the insolvent to him, of all the property.

Is there any law of *Virginia* known to us, which may make this a valid transfer of the goods in controversy? Any law of the *District of Columbia,* which can legitimate this transfer of the promissory notes now in controversy?

If the goods in controversy had not been withdrawn by the defendant below, from the protection of the laws of *Virginia,* and the plaintiff was in a court of that State, claiming title to them, and seeking redress for the alleged conversion; and if, as is now alleged, the *Virginia* law makes the transfer by the insolvent to the defendant below, valid, then the plaintiff would have been obliged to invoke to his aid the law of *Maryland,* and to ask the court below, to hear and decide the case, according to that law. What would have been the result, we are not to conjecture. The comity of nations, we are told, (see *Story on Conflict of Laws, p.* 38,) "is derived altogether from the voluntary consent of the latter," (the State, within whose territory it is attempted to make the law of another State obligatory,) "and it is inadmissible, when it is contrary to its known policy, or injurious to its interests;" and it is "only in the silence of any positive rule, affirming, or denying, or restraining the operation of any foreign laws, the courts of justice presume the tacit adoption of them, by their own government; unless they are repugnant to its policy, or prejudicial to its interests." This also, he assures us: "A nation will not suffer its own subjects to evade the operation of its own fundamental policy, or laws; or to *commit fraud in violation of them,* by any acts or contracts made with that design, in a foreign country; and it will judge for itself, how far it will adopt, and how far it will reject, any such acts or contracts." *See sec.* 106.

In answer to all that is urged for the appellant, about the comity of nations, the appellee insists, 1st, that we have no evidence of the existence of this *Virginia* law, which his adversary would invoke to his aid; and 2ndly, that, if its existence was conclusively proved, it does not furnish us with the law, by which this cause is to be tried here, in a *Maryland* court. These suggestions will be considered.

We are so much in the practice of looking into the reports of decisions of the *English* courts, and of our sister States, in order to learn what is our own law, that it may be well occasionally to remember, that these reports of adjudged cases are not evidence to us, of what is the law of the State or country, in which they are pronounced.

We are in this case left in ignorance, whether this law of *Virginia*, which is to direct us in our decision, is that which is to be found in her statute book, or is a part of that unwritten law, which is said to be the birthright of every citizen, and which, in our own State it is declared in the bill of rights, to be alterable, to be sure, but unalterable, except by the legislature of the State. How are we to discover, that *Virginia* has, or ever had any law, written or unwritten, which would give validity to the agreement, made under the circumstances disclosed to us in this case? We are called upon to say, that although this agreement may be, without doubt, fraudulent and void, and must be so pronounced, if this cause be tried by *Maryland* law, yet that the result will be very different, (it will be quite a fair transaction,) if from the law of *Virginia*, we are to learn its character. We have been repeatedly told, that our law of 1834 does not make any part of the law of *Virginia*. Possibly not. But it can never thence be inferred, that by no law of that State, is a transaction like this, declared not to be fraudulent. How then are we to learn, if it be needful for us to know, what the laws of *Virginia*, statute or common, say of a transaction like this? "The court of one State cannot, judicially, take notice of the laws and practices of another," 20 *Pick.*, 472. The written law of foreign countries should be proved by the law itself, as written. *Washington C. C. Reports, p.* 2. But the law of *Virginia*, which is to inform us,

whether this agreement is there deemed a fraudulent or fair one, is probably nowhere to be found among the statutes of that State; at all events, no such statute has been shown to us, and if it be, in whole or in part, unwritten law, then the book last mentioned, in the same page, tells us, that "the common, customary, or unwritten law is to be *proved by witnesses acquainted with the law.*" "They must be proved as facts." 1*st Greenl. on Evid., sec.* 486, see also sec. 409. So far, there is no difference of opinion, it is believed, anywhere. The oldest lawyers in this State cannot remember when, in regard to it, our courts entertained any doubt.

But in regard to the next inquiry, there is some conflict of opinion. In *Mullikin's case*, 1*st Pennsylvania Reports, p.* 125, *Gibson*, chief justice, speaking of the manner of proving a law of *Maryland*, says, "whether the property was bound by the proceedings in *Maryland*, when the attachment was laid, is a distinct and material fact which ought to have been expressly stated, because not only the existence of a foreign law, but the construction which is a part of it is determinable, not by the court, but by a jury." Now if this be true, surely reported cases are not to prove *facts* of this description. We can only know from them that the printer said, that the reporter said, that the judge said, that the law is, as he is made to say that it is. This is equally an objection to evidence by reported cases, if it be offered to the court. But *Justice Story*, in his *Conflict of Laws, sec.* 637, 638, after telling us that "the established doctrine now is, that no State takes judicial notice of the laws of a foreign country, but they must be proved as facts," proceeds, "but it may be asked whether they are to be proved as facts to the jury, if the case is tried at common law, or as facts to the court;" and answers, "it would seem as facts to the latter."

How this subject is understood in this court, will be seen in the case of *Thrasher vs. Everhart*, 3*rd G. & J.*, 242. This inquiry however, is not very necessary in a case like this, in which no evidence is offered either for the court or the jury. Such being the case, we are told in 1st *H. & J.*, 720, what is to be done by us. "No doubt the law of *South Carolina*, must

govern the court in determining upon the operation and validity of this deed, if they are different from the laws of this State. But no proof has been adduced that the laws of *South Carolina* will make this deed a good and valid deed, and without proof the jury cannot find what the law of *South Carolina* is, the court must decide it according to the laws of this State."

We may be told about the *lex rei sitæ*, to which the same answer may be given. It really does seem to be unreasonable to ask any court of *Maryland*, to find out and give effect to any law elsewhere, the effect of which would be, that a citizen of *Maryland* who designed to take the benefit of our insolvent laws by crossing the line which separates this State from the *District of Columbia*, or by going into any adjoining State, (taking with him his property,) may rid himself of all that he owes, and then return to *Maryland*, and rid himself of all his debts.

But of what benefit would it be to the defendant below to prove that there is no law in *Virginia*, like some of our insolvent laws? "The rule of comity," *Kent* says, in his *Commentaries*, *2nd vol.* 407, "is held to be overruled by positive law," and what is deemed the settled law of *Maryland* on this subject, some of the learned men who once occupied our seats, have long since told us. "If the legislative enactment of this State and another State should differ, it cannot be made a question *here*, which shall prevail. Where there is no constitutional barrier, we are bound to observe and enforce the statutory provisions of our own State." 5 *H. & J.*, 100, *Davis vs. Jacquin*.

Having now ascertained, that in the trial of this case, the law of *Maryland* alone is to govern our courts, we proceed to inquire, whether, according to that law, the court below expressed any opinion for which its judgment ought to be reversed. We are first to examine the defendant's proof of title. He has none according to his own showing, unless he acquired it by the agreement of the 5th June—the order of *Holton* the insolvent, to deliver to him the goods, and the delivery of them to his agent a few days afterwards. With that proof, also, have been connected the proceedings of the court in *Norfolk*. These proceedings, however, certainly gave to the appellant no title.

They can be relied upon, only to show a good and valid consideration, for the agreement of the 5th June.

It is contended, that if the jury believe every thing which is proved, of these proceedings, the agreement and consummation of it, then the plaintiff is not entitled to recover in this action. It is believed that the three prayers of the defendant below may be considered in connection.

In noticing these several prayers, it may be assumed, that if the agreement was a fair and *bona fide* one, every thing stated in it in regard to the title to this property, would be incontrovertible. But it is charged that this agreement was obtained by fraud; that it is the result of a system of fraud and extortion, and compulsion, practised by the defendant below upon his insolvent debtor, and ought to be avoided for that reason, and further, that even if binding upon the insolvent, it would yet be fraudulent and void, as against his creditors; that there is proof of an actual, as well as statutory fraud. What is said in regard to the latter, will be noticed when we come to examine one of the instructions, which the court gave at the instance of the plaintiff below.

These prayers require the court to say, that if the facts stated are proved,—the proceedings in the *Norfolk* court, the execution of the agreement, and the dismissal of the proceedings in *Norfolk*, in consideration thereof,—then the verdict of the jury must be for the defendant; notwithstanding any urgency by the defendant below, or threats of taking the goods at *Washington*, whereby the agreement was procured.

1st. Fraud or no fraud, (not statutory fraud,) is an important question in the case; upon the decision of this depends, in a very great measure, the plaintiff's right to a verdict. There is certainly testimony *tending* to establish the charge of fraud and extortion in procuring this agreement, (the essential *title paper* of the defendant below,) which, whether it be technically duress or not, if established, may invalidate this instrument. 2 *Greenleaf's Evidence* 331. There may have been "a species of necessity, which acted upon and constrained the will, and being under the necessity of choosing one, he chooses the least pernicious of the two."—"It may be a case in which the

rule cannot be said freely to exert itself, being rather passive than active; or if active, it was so, rather, in rejecting the greater evil, than in choosing the less?'' Notwithstanding all this, it is insisted, that the defendant below must recover, because of the agreement, and the consideration for it, and the dismissal of the proceedings in *Norfolk*. The result of these proceedings, if brought to a decision, it is said, cannot be doubted, and this too, although we are furnished with no means of judging, but the *ex parte* statements of the defendant below, and these statements admitted to be erroneous, in, at least one essential point—the ownership of the notes. But how was the debtor benefited? He paid his debt, it is said; but it was paid to the wrong persons: he got his property released, but, not for himself; it was to become the property of the defendant below.

With all this evidence it is not quite clear that such an agreement transferred the notes and goods even as to *Holton*—at all events the court could not so determine. If *Holton* could successfully impeach the transaction, for fraud, the property was still his, until it was transferred to his trustee, who then acquired a right to sue for it. But if the insolvent could not sue, if he is to be regarded as *particeps criminis*, would it thence follow, that the trustee could not? Whether a deed be fraudulently obtained from an insolvent, or be the result of a fraud practiced upon him, if thereby his creditors are defrauded, the trustee is the person to claim the property in their behalf. In the latter case it is obvious, for the former the act of 1816, ch. 221, has provided. *See*, also, *Kolb vs. Whitely*, 3 *G. & J.*, 188.

All the property of an insolvent, wherever situate, is conveyed to the trustee; and although it may not be quite certain that all other States will so declare, in regard to property for which the trustee brings suit in their courts; yet if the property to which the trustee thus becomes entitled, be brought back again to *Maryland*, it is not for our courts to say, what foreign courts would declare of the deeds of insolvents, so far as they transfer property, which, at the time, was without our territories, When *Plater*, in the case in 6 *G. & J.*, 116, took the benefit of

our insolvent laws, his claim against the government of *Great Britain* certainly was not within the limits of *Maryland:* yet this court had no hesitation in deciding it was a part of the trust fund, and the trustee was entitled to it. So too, if our own statutes declare that a deed of an insolvent is, (for reasons proved to exist in the case,) fraudulent, although our courts cannot meddle with the property while without our territory, still, *here*, it is regarded as part of the trust fund, and if it be brought into *Maryland*, they will entertain a suit for it; and in deciding it, will be governed by the statute of *Maryland*, disregarding the *lex rei sitæ*.

With such proof in the cause, we must forget all that was said in the case of *Davis and Calvert*, 5 *G. & J.*, 303, 304; and in various other cases, before we can condemn the decision of the court below, in regard to the three prayers of the defendant below.

It has been contended, that even although the agreement was fraudulent, and the plaintiff had a right to claim the goods and notes, still he could not recover, without proof that he paid or tendered the money, ($200,) which the defendant below paid to the insolvent, at the time of the execution of the agreement. Here we are reminded of the doctrine of *Lord Mansfield*, that trover is an equitable action, and for this reason only, (if for this reason,) it is believed, can a tender of this money be insisted upon. In order to a decision of this question, it seems to be quite unnecessary to ask, whether trover is an equitable action, or what, in later decisions, has been said on this subject. Equity does require in every case of usury, that the principal, with legal interest, be paid or tendered, before it will relieve, at the instance of the debtor. But can equity ever require a return, or tender by the trustee, or the creditors in this case, of the money, which seems to have been the consideration of this agreement? The contest is between the creditors of the insolvent, and his grantee; the former alleging, that the money paid to their debtor, was paid by the latter in order to defraud them. Now if the fact be so, upon what principle of equity can a fraudulent grantee claim, that those who complain of the fraud, shall return money paid, not

to the persons complaining, but to their debtor, in order to induce him to defraud them. Surely such a defence is against all equity. It is true, that he who asks equity must do equity. But what equity is there in asking of creditors, who claim to be defrauded by one of their number, that they refund all that the defrauding creditor deemed it expedient to use, in order to accomplish his design of defrauding them? It is quite enough that he be allowed to participate in the fund, when it is recovered.

We are next to examine, if there be error in the first instruction which was given by the court.

To this instruction it is objected, that the contract, into which *Johnson*, in behalf of the defendant below, entered, was not binding upon the latter, because he had no authority to make such an agreement; and moreover, if he had the authority, there was no consideration for it: it was *nudum pactum*.

It is in proof, that a meeting of the creditors of *Holton* was proposed by him, and approved of by the defendant below. The meeting was, to be sure, for the relief of their common debtor, but with the hope of benefiting thereby, the creditors themselves. It was to ascertain, whether, by giving to *Holton* the indulgence which he asked, his creditors might not be secured the amount due to each of them. All parties, it was possible, might profit by it, and with a view to ascertain if such was likely to be the case, a meeting was contemplated. It could not but be known to those who knew of the meeting, and were interested in it, that, in order to a final adjustment of the business, it might be necessary again to assemble. Such was soon discovered to be the case, and a postponement was found to be necessary, not (as far as we can learn,) because so small a number attended as soon as the others did, but because if all the creditors had been then present, nothing definitive could be done, for want of an inventory of the goods then at the several places named. *Holton* says *Johnson* remarked, that he (*H.*) had better go to *Washington*, &c., and make inventories, and that five days would suffice for the purpose; and *Lewis* and *Johnson* agreed, that in the *interim* (that is.

according to their calculation, during five days thereafter,) no legal proceedings should be had. Here then, is a positive contract, that neither *Gardner* nor *Lewis* should seize any of the goods, by attachment or otherwise; and the attachment issued in *Norfolk* was in fraud of that agreement; so that the only question is, whether the defendant below was bound by such agreement, to which his agent was a party?

If this be regarded as an agreement with *Holton*, surely there was a sufficient consideration for it. The journeys which he agreed to take; the time during which he agreed to be employed, in and about the business which they required of him, and the money he must necessarily expend, in journeying to these several places, and while in them, made the agreement a binding one, if for no other reason, it can be invalidated.

But the defendant himself was not at the meeting, and his agent, it is supposed, had no authority from him to enter into such an agreement. What then, was he authorised to do? He was to represent the defendant "in the most favorable manner," and this, to be sure, did not mean that he was to execute bonds, purchase farms, &c., for him whom he represented; but *Mr. Johnson* was at that meeting to be *Mr. Gardner*, while acting upon the business for which they had assembled; and a necessary part of that business surely was, not to dispatch it at once, that evening, when it was to be presumed that some delay would be necessary; and it was in proof that the defendant below supposed those inventories to be necessary, in order to enable the creditors to judge, whether for their own advantage and to secure their own debts, the indulgence asked by the debtor, (that is, that his creditors would not institute any legal proceedings against him, for twelve or fifteen months,) should be given him. Can it be said that such an agent was not authorised, at such a meeting, to act upon, or to make, in behalf of *Gardner*, every proposition which was made in the course of that evening?

For the contract entered into with the debtor, there was a sufficient consideration. But when creditors assemble for such a purpose, is there no contract, *inter se*, necessarily implied,

and a breach of which is a gross fraud? They convene to transact business, by which each hopes to save—some more, some less—money; and in order to the accomplishment of the object of each, it is essential that each should act with the utmost good faith, do nothing whatever, which, if done, would frustrate the object of the meeting. A negotiation is set on foot; and pending such a negotiation, can any one of the parties to it be allowed, with impunity, to practise such a deceit upon the others, and thereby wrong every other person, who, by the practice of such a deceit, suffers a pecuniary loss?

The defendant in the court below, according to the testimony, approved of the meeting, and told *Holton*, and of course, authorised him to say to the other creditors, that there could be no difficulty with him, and that the man who was to be there to represent him, would be there to agree to the most favorable terms.

But few of the creditors, however, attended, and is it usual, or expected, that all the creditors will attend such a meeting? If one chooses to make a promise, which would be obligatory upon him, provided all of them did attend, is that promise utterly null and void, by reason of the absence of some from a particular meeting, and although the promise is not made to depend at all upon the number of creditors who attended, or the amount of debt which was represented? It is surely binding, until notice is given to all others really interested, that the party who promised is no longer to be bound. How else is such business to be transacted? How is any one of the parties to know, whether he is yet bound or not bound, if any one has the right, without giving notice, to absolve himself from his promise, and to act in direct violation of it? He may, indeed, by his promise, verbal or written, agree to be bound, only when a certain number of the creditors, or those holding a certain amount of debt, bind themselves also, but the promise being otherwise, he cannot act as if it were so.

Having promised to indulge, if others would, was he under no legal obligations to keep the promise, even one day after it was made, and when no one had authorised him to suspect that, to the the terms, any one of the creditors had any objec-

tion? And who are the parties now complaining of the breach of faith by the defendant below, whereby they are damnified and deprived of their proportion of the assets of their debtor? All the creditors who are here, suing by him whom the law appoints to institute the suit, and to such an action, is it any defence to say, that any of the creditors lost their right to complain of the fraud, because they had not agreed to indulge their debtor a very few hours indeed after the defendant sanctioned the proposition made by the debtor? He practised a deceit; by the practice of it, he wronged and defrauded the other creditors, and has secured to himself thereby, considerable profits, which it is against equity and conscience that he should retain. Upon what principle then, can it be insisted, that the proceedings at *Norfolk* did not amount to a fraud, practised, both upon the debtor and his creditors, the defendant himself being one of them, and as such, entitled hereafter to claim his just proportion of the assets in controversy? Can he (the defendant below,) set up such a defence, in bar, to this action, when, but for the title so acquired, he would have no defence to this action?

As the case is understood, the plaintiff below charged the defendant with more than one description of fraud. The allegation seems to be that the insolvent was sometimes a party designing to cheat his creditors, and then he is associated with the defendant, at other times as the party cheated by the defendant below, then acting *single handed.* The fraud alleged sometimes to be practised, is statutory, and at other times, other fraud.

In the second instruction given by the court below, the charge, is that the agreement, although the insolvent was *particeps criminis*, is declared to be fraudulent by our insolvent system. We will now examine this transaction in order to ascertain if the law of 1834, does not condemn it.

Certain conveyances, &c., made or allowed, or caused to be made, whether upon request or otherwise, shall be declared to be made with intent to give an undue and improper preference. Whose conveyances are by this act declared to be so made? The conveyances of applicants for the benefit of our insolvent

laws. Are all conveyances &c., made by them, declared to be so? No: only those which are made in favor, or with a view to the advantage of or security, or with intent to prefer, any creditor or creditors, security or securities, of such applicant; and provided such applicant shall have no reasonable expectation of exemption from liability or execution for, or on account of his debts, without applying for the benefit of the insolvent laws. The conveyance, assignment, &c., must not be for valuable consideration; and that law is not to apply to any case where the said creditor or security (receiving the conveyance, &c.,) shall appear not to have notice of the condition of insolvency of said debtor. The language of the act of Assembly, is certainly sufficient to comprehend the instrument, which the defendant below says is his title paper. The facts, which if they exist will make this paper fraudulent and void, must be proved to the satisfaction of the jury; only *de jure respondent judices*.

We are not now disposing of a motion for a new trial. We need not then stop to enquire what proof the record furnishes of a valuable consideration for this instrument of writing, or whether defendant below had notice of the debtor's condition of insolvency; whether the alleged promise to dismiss the proceedings in court, was any consideration for an agreement, which made the party promising, the owner of every thing which he could properly recover by prosecuting the suit. Neither are we to enquire whether there was any thing like certainty in the result of the suit, wherein the plaintiff in order to obtain an attachment and seizure of the goods, swore that he was the owner of the notes, which constituted so large a portion of his claim, when in truth he was not; and although not the owner, he was claiming the amount of them, when not one cent of that amount could rightfully be demanded by or paid to him; and without due diligence on the part of the owner of them, in demanding payment and giving notice of the non-payment, the defendant below never would be responsible for one cent of them. These and many other matters of fact might be considered by the jury, in judging of the matters in issue, which are now settled by their verdict, unless that verdict was the result of a misdirection or improper refusal to instruct the jury in

some matter of law, needed to assist them in finding the matters in issue.

What question then does the second instruction present to this court? what are the objections to this instruction as given by the court below? We are told in one of the points filed, that it takes from the jury the intent to prefer by the transfer of the agreement; puts the validity of the transfer solely upon the fact of the transfer, the want of reasonable expectation of being exempted, on the part of *Holton*, and the notice of his condition by *Gardiner*, and asks the court to declare that the intent to transfer is the legal consequence of these.

The jury are to find the intent to transfer, as stated in the testimony of *Holton* and *Tucker*, and in addition thereto, that at the time of the agreement, *Holton* had no reasonable expectation of being exempted from liability or execution for, or on account of his debts, without applying for the benefit of the insolvent laws; that the defendant had notice of *Holton's* condition of insolvency. If they found those facts, they were instructed, that such transfer was made under a view and expectation of becoming an insolvent debtor, with intent thereby to give an undue and improper preference to the defendant, and vested in defendant no title to said property.

It is not, and cannot be denied, that there was testimony before the jury, which had a tendency to prove the facts of which they were to be satisfied.

There is no doubt, that if any transaction necessarily produces the effect which a statute declares to be fraudulent, as against creditors, the court may pronounce such act to be fraudulent. Whatever is the necessary consequence of an act deliberately done, *that* the law presumes every man to intend. It is said, *Conn. Reports*, 296, that "when the effect of an act, understandingly done, is necessarily injurious to the rights of another, the *quo animo* is not a matter of fact, it becomes an inference of law."

It is one question, whether the facts and circumstances, which, if they exist in a case, constitute a fraud, are proved to exist in that case. If their existence be shown, the law says, and it is the province of the court to pronounce the law

to be, that they constitute a fraud. This appears by the authorities which were cited at the bar.

When the insolvent executed a deed, by which he designed to transfer to one of his creditors so large a proportion of his effects, and in satisfaction of the whole of his debt, and had at the time no reasonable expectation of being exempted from liability or execution for, or on account of his debts, the court may well say, that such deed vested no title in the defendant, and if they find, that when *Holton* became the debtor of defendant, they were citizens, residing in *Maryland*, and have continued to be such up to the present time, the plaintiff is entitled to recover.

The instruction does not make the validity of the transfer to depend upon the fact of the transfer, but upon the want of reasonable expectation at the time of being exempted from liability or execution for his debts but by applying for the benefit of the insolvent laws, and the knowledge then had by the creditor of the condition of insolvency of the debtor.

JUDGMENT AFFIRMED.

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CALEB D. OWINGS, CORNELIUS H. OWINGS, FRANCIS R. GRIFFITH AND OTHERS, USE OF EDWARD GREEN, *vs.* JOHN B. EMERY AND CYRUS GAULT.—*December* 1848.

On the 11th of July 1840, *N O* leased to *E* and *G*, a granite quarry, called the *Fox Rock Quarry*, for six years, to commence 10th of November 1840. The lessees stipulated, to quarry and get out at least 40,000 cubic feet of stone, and to pay therefor one and-a-quarter cents per foot, amounting to $500, or to pay for that quantity annually, by quarterly instalments. Before the execution of this lease, on the 5th of July 1840, the lessor gave to the lessees a receipt, acknowledging that he had received from them $866, "to be returned them in granite stone to the amount of 69,300 feet, between the 10th of November 1840, and the 10th of November 1846, from my quarry, known by the name of *Fox Rock Quarry*." HELD:

1. That the true interpretation of the agreement between the parties, requires these two papers to be taken together as one contract; they are to be construed with mutual reference to each other, and the amount mentioned in the receipt must be considered as advanced, on account of rents to accrue under the lease.

2. The intent of the parties no doubt was, that these advances should be applied, chronologically, to the rents as they became due; but, upon proof that only a part had been so applied, and that the lessees had paid other moneys in liquidation of prior rents, it was HELD, that they were entitled to have such advances set off against rents accruing subsequent to the time when, by a chronological application, prior rents would have extinguished them.

A legal plaintiff on the record is not a competent witness, even though the party, for whose use the suit is brought, offers to deposit in court any sum which the court may direct, to cover the liability of such plantiff for costs.

APPEAL from *Baltimore* county court.

This was an action of *debt*, brought by the appellants against the appellees, to recover the sum of $375, the amount of three quarters of a year's rent, accruing under a lease, of a certain quarry, from *Nicholas Owings*, under whom the plaintiffs claim, to the appellees, dated the 11th of June 1840.

This lease, upon which the plaintiffs counted, will be found set out in full, in the case of *Owings and Griffith vs. Emery and Gault*, 6 *Gill*, 261. The material parts of it, are also recited in the opinion of the court in this case, delivered by his honor, *Judge Frick*.

The defendants pleaded *nil debet*, with leave to give in evidence any special matter, which might be pleaded in bar of the action, upon notice, &c.

1ST EXCEPTION. At the trial, the plaintiffs read in evidence the lease, and the will of *Nicholas Owings*, executed on the 7th of July 1841, by which he devised the reversion in said quarry, to his son *Beale*, during his natural life, and at his death, to his children lawfully begotten, with power to said *Beale*, in case he should die without issue, to leave said reversion by last will and testament, to any or all of the children or grand-children of said *Nicholas*, at his pleasure. This will also contained the following clause: "It is my will and desire, that the rents arising from the quarry, known by the name of *Fox Rock Quarry*, be applied to discharge the incumbrances on the same." (This clause of the will, this court, in the case of *Emery and Gault vs. Cornelius H., and Caleb D. Owings, Adm'rs of Beale Owings*, 6 *Gill*, 191, being an action upon the same lease, decided, did not separate the rents from the reversion,) and

proved that said *Nicholas*, at the time of his death, left five children, the legal plaintiffs in this action, and said *Beale Owings* who died in July 1843, unmarried, without issue, and intestate. The defendants then, under the leave annexed to their plea, proved notice to the plaintiffs, that they would give in evidence, and insist, that the sum of $866, advanced by the defendants to *Nicholas Owings*, or for his use, to enable him to settle with *Noah Worthington*, on or about the 5th of June 1840, was advanced and paid on account of the rent thereafter to accrue, and now claimed in this action, under the lease mentioned in the declaration, and should insist, that this sum ought to be credited upon this lease, (whatever may be the amount,) at the time this action was instituted, either as payment, or by way of off-set.

And then proved by *Mathew G. Emery*, that prior to the execution of said lease, the said *Nicholas Owings* told him, on one occasion, that he would be under the necessity of paying a certain *Noah Worthington*, the sum of $866, which he could not raise, unless the defendants would advance it, on the rent of the *Fox Rock Quarry;* that a week or two afterwards, and shortly after the execution of said lease, the said *Nicholas* told him, that the defendants had advanced the aforesaid amount to him, and he would be unfortunate, as it would take all the resources of his quarry for a year or so, before he could get any rent. The plaintiffs then read to the jury the receipt of *Nicholas Owings*, which is recited in the opinion of this court, and the defendants claiming to apply the sum of money therein mentioned, as an off-set against the rents sued for in this action, the plaintiffs then produced and proved an assignment of these rents, under seal, from the legal plaintiffs to *Edward Green*, for whose use the suit was brought, executed on the 1st of April 1844.

And further offered, on behalf of said *Green*, to pay into court any sum of money which the court might direct, to cover the legal liability of said nominal plaintiffs, for the costs of this suit, as a deposit to meet said costs, in the event of a verdict for the defendants; and then said *Green* produced *Caleb D. Owings*, one of the nominal plaintiffs, and offered to swear

him as a witness, as soon as the court would decide what sum should be paid into court by *Green*, to release the liability of said *Caleb*, for costs as aforesaid, and so soon as said money should be actually paid into court, or to such person as the court might direct: which payment said *Green* offered himself then and there ready to make, stating by his counsel, that said *Caleb* was offered as a witness to disprove the testimony of *M. G. Emery*, aforesaid; and said *Caleb*, being in court, assents to be examined as a witness for the purpose aforesaid, or any other purpose. But the court (Le Grand, J.,) refused to determine what amount should be paid into court by said *Green*, or to allow said *Caleb* to be examined, as proposed, because he was a party to the suit, and incompetent, by reason thereof, to testify. The plaintiffs excepted, but this exception was abandoned in argument in this court.

2nd Exception. The plaintiffs then prayed the court to instruct the jury, that upon the evidence aforesaid, if believed by them, the said $866 must be applied chronologically to extinguish the rents as they accrued, under the lease, and that the defendants could only obtain a credit for so much, (if any,) of said sum, as the jury might find remained unextinguished by rents, accruing anterior to the rents embraced in this suit. But the court refused to grant this instruction, and instructed the jury, that it was at their election to apply the said sum to the rents, as they accrued under said lease, chronologically or not; and that the jury might, if they thought proper, apply so much of said sum as was necessary to defeat the whole claim of the plaintiffs in this action, it being admitted that only $394 of said sum of $866, had been already credited or applied, on account of said rents, by the verdicts of juries, in two suits brought in this court, by different plaintiffs, against defendants, for rents accruing under the lease in evidence, there being rents for three-quarters of a year under said lease, not embraced in either of the present or former suits. The plaintiffs excepted.

3rd Exception. The defendants, upon the whole evidence, then prayed the court to instruct the jury, that if they find, that the receipt offered by the plaintiffs, of the 5th June 1840, for $866, was given by *Nicholas Owings*, under an

agreement, that the same should be applied to the payment of rents, thereafter to become due from defendants to said *Nicholas*, from the *Fox Rock Quarry*, under the lease of the 11th June 1840, and that the said sum of $866, has not been returned to said defendants, by said *Nicholas*, or those claiming under him, or in any way satisfied, that then they must allow said receipt, or so much thereof as may be now due, as an offset to the plaintiff's demand, which instruction the court granted, and the plaintiffs excepted. Judgment of *non pros.* on verdict for the defendants being entered, the plaintiffs appealed to this court. The statement of evidence, in the bills of exception, and prayers, was assented to by the counsel for the defendants.

The cause was argued before SPENCE, MAGRUDER, MARTIN and FRICK J.,

By BRENT for the appellants, and
By HINKLEY for the appellees.

FRICK, J., delivered the opinion of this court.

In this case, the action is instituted to recover the amount of three-quarters rent, accruing under a lease from *Nicholas Owings*, to the appellees. The appellants claim title to the property under said *Nicholas Owings*, the original lessor, deceased, and no question is raised, of their right to sue in this action.

The lease, in evidence, bears date the 11th of July 1840, to commence on the 10th of November 1840, and to endure for the term of six years; the lessees to pay for the use of the premises, and the stone to be quarried and got out of them, one-and-a-quarter cent for every cubic foot so quarried and got out, binding themselves so to quarry and get out at least 40,000 cubic feet, amounting to $500, or to pay for that quantity annually, by quarterly instalments; and for all over and exceeding that quantity, to pay additionally at the same rate aforesaid.

On the 5th of July 1840, (six days preceding the execution of the lease,) a receipt in the following terms was passed from *Nicholas Owings* to the appellees.

"Baltimore County, *July 5th*, 1840.

Received of *Messrs. Emery & Gault*, eight hundred and sixty-six dollars, to be returned them in granite stone to the amount of 69.300 feet, without interest, between the 10th of November 1840, and the 10th of November 1846: they being at the expense of quarrying and transporting the same from my quarry, known by the name of *Fox Rock Quarry*.

Nicholas Owings."

And under leave to give in evidence any special matter that might be pleaded in bar; this receipt is produced by the appellees, as a set-off or payment of the rent sought to be recovered in this action. An attempt has been made to give to this receipt a construction independent of the lease. But it must be manifest that this agreement between the parties was a preparatory step to the lease, afterwards executed within a few days; and that at the time of the advance of the said sum of money to *Owings*, the lease of the quarry was in contemplation. Both instruments correspond in their essential stipulations. They are made conterminous with each other; both to begin and to end on one and the same day; and the $866 to be returned in 69.300 feet of stone, is at the precise rate of one-and-a-quarter cent per foot. The receipt is open to no rational interpretation, unless it can be made to refer to the subsequent lease. The lease effectually neutralizes any action of the appellees under the receipt. It compels them to take out 40,000 feet of stone or pay for that quantity, and for every foot of stone over that computation, they are also required to pay at the same rate. And unless they are supposed to be required to pay double for all over 40,000 feet, the receipt is merged in the lease, and it must be intended that the stone referred to in the receipt, was to be quarried and got out, under the lease. That instrument covers the whole term set out in the receipt; and the condition in it, is that no stone can be taken from the quarry, but what must be paid for under the terms of the lease. The two agreements cannot therefore stand independent, but must be construed in reference to each other. And the appellees insist in their notice to the appellants at the trial below, that this advance was made on account of the rents thereafter to accrue

under the lease, and claim its application in part, to the credit of the rent in controversy in the present action.

The appellants, on the contrary, deny that there can be any legal appropriation of any part of these advances to the liquidation of the rents in the present suit.

Before the date of the writ in this case, claiming rent from the 10th day of May 1843, two years and a half of prior rents had accrued under the lease, to the parties in interest, preceding these plantiffs, and if these advances, (as they insist they ought,) had been applied in liquidation of these antecedent rents, they must have absorbed more than the whole sum, and would leave no balance to be set-off against the present claim.

On this ground they prayed the court to instruct the jury, "that the said sum of $866, must be applied chronologically, to extinguish the rents as they accrued under said lease; and that the defendants could only obtain a credit for so much, (if any,) of the said sum of money as the jury might find remained unextinguished by the rents accruing under said lease, anterior to the rents embraced in this suit."

But the court refused to grant this instruction, but directed the jury, "that it was at their election to apply the said sum of money to the rents as they accrued under said lease, chronologically or not, and that the jury might, if they thought proper, apply so much of said sum as was necessary to defeat the whole claim of the plaintiffs, *it being admitted*, that only $394 of the said sum of $866 had been already applied or credited on account of said rents, by the verdicts of juries, in two suits brought in this court by different plaintiffs, against the defendants, for rents accruing under the lease in evidence, there being rents for three-quarters of a year under said lease, not embraced in either of the present or former suits. And upon the further prayer of the defendants, also instructed the jury, "that if they find from the evidence, that the receipt offered in evidence by the plaintiff of the 5th of June 1840, for the sum of $866, was given by *Nicholas Owings*, under an agreement that the same should be applied to the payments of rents thereafter to become due from the defendants to said *Owings*, from the *Fox Rock Quarry*, under the lease of the 11th of June 1840, and that the

said sum of $866, has not been returned to said defendants by *Nicholas Owings*, or those claiming under him, or in any way satisfied, that then they *must* allow said receipt, or so much thereof as may be now due as an off-set to the plaintiff's demand."

The propriety of these instructions is submitted for the decision of this court.

We have shown that the true interpretation of the agreement between the parties, requires that the two papers must be taken together as one contract, and are to be construed with mutual reference to each other; that the amount mentioned in the receipt must be considered as advanced on account of rents to accrue under the lease.

Was the court below correct in saying, that the jury might apply them or not, as they thought proper, to the liquidation of the present rent, so as to defeat the whole claim of the appellants; and that they were not bound to apply them chronologically, in the order in which they became due?

This latter mode of application was certainly in the view of *Nicholas Owings*, when the money was advanced. For he states to *Matthew G. Emery*, the witness produced, "that it would take all the resources of his quarry for a year or so, before he could get any rent." This evidence was admitted without objection, and serves to explain, not to contradict the receipt, or control its written stipulations. It presents his own view of the time and manner in which the advances were to be liquidated. And under his own interpetration of the agreement, the rents thus applied would, before the time the present action accrued, have extinguished the whole sum: more than two years having expired from the date of the lease. It is also the probable and natural presumption, that the defendants, would so seek to apply their advances, and deduct the sum from the first rents due by them under the lease. With this relation between the parties connecting *Emery's* testimony with the receipt of *Nicholas Owings*, it would seem in the absence of any other conflicting evidence, to be the proper view of the case, and the correct instruction to the jury, that if they believed *Emery*, the advances were to be applied chronologically to the

rents in the order in which they became due, until the sum advanced was absorbed. So applied, the amount of the receipt would be liquidated before it reached the present cause of action, and the plaintiff would have been entitled to recover the rent now in dispute.

But it appears, there was other evidence in the cause, to show that the amount of these advances was not actually exhausted, when the present rents accrued. That evidence is stated as the foundation of the instruction of the court, upon the appellant's second prayer, as an admission of the parties, that, "only $394 of the $866, had been before credited or applied, upon account of the said rents," and by agreement of counsel, was submitted and argued, as part of the case presented to the court.

From this admission it results, that the advances had not been strictly applied to the preceding rents, in their chronological order, but that other moneys must have been paid by the defendants, in the liquidation of prior rents, postponing the application of the advances, or part of them, to the present period of the lease. It was for the advantage of the appellees, that they should have been sooner applied. Yet a portion still remains due, to show that they must have waived the application, and satisfied a portion of the antecedent rents, in some other form. Why, then, should the appellees not have the benefit of the application now, when it was manifestly an indulgence to the lessors, that they were not sooner applied, under *Owings'* own interpretation of his contract, in the order in which the first rents accrued under the lease?

The appellants admit, that the whole amount is not refunded from the rents. When is the period assigned for the final liquidation of these advances? If not now set off and extinguished, according to the understanding of the lessor, at what subsequent point of the lease are they to be adjusted?

In view of the admissions in the case then, the court below were correct in refusing to instruct the jury, that this amount of $866, had been legally absorbed in the antecedent rents, which they would virtually have said, in granting the appellant's second prayer; and they properly instructed them, that if

they find, from the evidence, that the amount of said receipt has not been returned, or in any way satisfied, by *Nicholas Owings*, or those claiming under him, they must allow the said receipt, or so much as may be found due, as an off-set to the appellant's demand.

This mode of application of the money here in question, is not now, for the first time, adjudicated. It was before this court, presented in the same form, at December term 1847, by these appellees, against the executors of *Beale Owings*. The third prayer of the appellees in this record, the same as there in form and substance, was, by this court, affirmed to be the proper direction to the jury; and upon the admission here, that these advances are not yet exhausted, is the proper instruction in the present case. The instruction asked by the appellants assumes, that all the rents that did accrue, under the lease antecedent to that claimed in this suit, must *legally and of necessity* have been satisfied out of these advances, and in no other way. How could they so say, that this whole amount had been thus applied and exhausted, when the antecedent rents might have been, and must have been satisfied, in some other way, if it be true, as admitted, that only a portion had been applied to the large amount of rents which had fallen due, before the claim for which the present suit is brought?

Some further objections have been urged, to the two instructions of the court, on the ground of inconsistency; the first, submitting to the jury, that if they find the advances, or any portion of them, are still unpaid, they may, at their election, set them off or not, against the present rent, the other directing, without qualification, that they *must* so apply them. Whether it was proper to submit it, under the evidence admitted, to the option of the jury, to determine the right of set-off, it is not now necessary to examine. The verdict is in conformity with the proposition and instruction upon the defendants' (the appellees') prayer, and under the case as presented to this court, the judgment of the court below must be *affirmed*.

Any reference to the first exception of the appellants is necessarily omitted, because in the argument of the cause it was properly abandoned.

JUDGMENT AFFIRMED.

## The President, Directors and Company of the Bank of the United States, *vs.* The Merchants Bank of Baltimore.—*December* 1848.

A suit was commenced, by an attachment, issued on the 11th of September 1841. The plaintiff filed a declaration in *assumpsit* on the 29th of April 1842, to which the defendants, on the same day, pleaded *non assumpsit*, and on the 10th of June 1842, under leave to amend, they pleaded, that the plaintiff ought not further to maintain its action, because the plaintiff, on the 23rd of April 1842, had recovered a judgment against the defendants in the district court for the city and county of *Philadelphia*, in the State of *Pennsylvania*, for the same cause of action, in a suit commenced in said court since the issuing of the original writ in this case, which judgment remains unreversed, and in full force and effect. Held:

That this defence was directed against the right of the plaintiff to recover in the form of action adopted by it, and could not be pleaded in abatement, *puis darrein continuance*, but was properly interposed as a special plea, in bar to the further maintenance of the action.

It is not the priority in the commencement of one action that renders the judgment obtained therein, a bar to the recovery of a second judgment in another, but because the first judgment when given, whether in the action commenced first or last, extinguishes the original cause of action, and gives to the plaintiff in lieu thereof one of a higher nature.

The pendency of another suit must be pleaded in abatement, but the plea of a judgment recovered, is not matter in abatement. It does not go to the form of the remedy, but to the right of the plaintiff.

The pendency of a prior suit for the same cause of action will abate a subsequent suit, but the converse of this is not true; the first suit will not be abated by the plea of another suit afterwards commenced, for the same cause of action.

If the matter presented by this plea had been, the pendency of a suit in another State for the same cause of action, it should have been pleaded in abatement, and verified by affidavit or supported by an exhibition of the record, and the proper place for such a plea would have been in the *Pennsylvania* suit.

Where matter of defence arises after the commencement of a suit, it cannot be pleaded in bar of the action generally; it must, if it arises before plea or continuance, be pleaded as to the further maintenance of the suit, if after issue joined, *puis darrein continuance*.

The right to assail a judgment, on the ground that the court pronouncing it had no jurisdiction of the subject or the parties, is undoubted, with respect both to domestic and foreign judgments.

But it is an acknowledged and fixed principle of universal obligation, resulting from the comity, and respect due from one judicial tribunal to another, that a judgment of a court of record of a sister State, is in itself *prima*

*facie* evidence of jurisdiction; and it is not necessary for the party pleading such judgment, to set out affirmatively in his plea, the jurisdiction and facts upon which the power and authority of the court pronouncing the judgment depend.

At common law, the original cause of action is extinguished or merged by a judgment, which is conclusive evidence of indebtment between the parties, and final, unless reversed, with respect to the subject matter adjudicated; and in the absence of proof of any statutory modification of this principle, it must be assumed, that such is the legal effect of the judgments of their courts in the State of *Pennsylvania*.

The principles deducible from the authorities in regard to the construction of the 1st sec. of the 4th article of the Constitution of the *United States*, and the act of Congress of 1790, are:

1st. That if the judgment of the district court for the city and county of *Philadelphia*, pleaded in this case, would be regarded by the courts of *Pennsylvania*, as conclusive evidence of the existence of a debt due by the appellants to the appellee, it is so to be considered by the courts of this State.

2nd. That the original cause of action was extinguished by the judgment of that court; and

3rd. That an action of *assumpsit* cannot be maintained on the original demand.

The cases of *Brengle vs. McClellan*, 7 *G. & J.*, 434; *McElmore vs. Cohen*, 13 *Pet.*, 330; and *Cameron vs. Wurtz*, 4 *McCord*, 278, deciding, that the act of Congress of 1790, does not invest judgments of the States of the Union with a general extra-territorial operation, are not in conflict with the doctrines of this case.

The 5th sec. of the act of 1832, ch. 260, authorising a corporate body to appear to an attachment and contest the claim of the plaintiff, by "pleading or otherwise," clearly gave the right to the appellants to file the plea interposed by them in this case.

A plea which would be regarded as an answer to an action of *assumpsit*, if unaccompanied by an attachment, must be treated as valid, notwithstanding the controversy originated in a proceeding of that kind.

APPEAL from *Baltimore* county court.

This was an *attachment* issued by the appellee against the appellants, on the 11th of September 1841, and laid upon certain real estate of the defendant, lying in the city of *Baltimore*. The facts and pleadings in the case are fully stated, both in the opinion of this court, and of the court below, delivered at January term 1848, by his honor, JUDGE LE GRAND.

This proceeding, commenced by an attachment, which was issued at the instance of the plaintiff, on the 11th september 1841, to recover the sum of $151,342,72. On the 24th Sep-

tember the attachment was laid on certain real estate. At the following January term, being the first appearance term, there being no appearance, there was a judgment nisi. On the 25th January, under the 5th section of the act of the Assembly of 1832, ch. 280, the defendants appeared by their counsel; and on the 29th of April 1842, plaintiff filed its declaration, to which defendants on the same day filed their plea of *non assumpsit*. Afterwards, on the 10th June, defendants, under leave of the court, filed an amended plea, in which it is alleged the plaintiff ought not to maintain its action, inasmuch as the plaintiff, after the day of the issuing forth of the writ in this cause, that is to say, on the 31st day of March 1836, in a certain court of record, called the district court for the city and county of *Philadelphia*, in the State of *Pennsylvania*, impleaded the said defendant in a plea of trespass on the case, &c., for not performing the same identical promises and undertakings, and each and every of them in the declaration mentioned, and that such proceedings were thereupon had in said court in that plea; that afterwards, to wit, on the 23rd day of April 1842, the plaintiff, by the consideration and judgment of the said court, recovered on the said plea against the said defendants, $159,676.20, for its damages which it had sustained on occasion of the not performing the same identical promises and undertakings in the said declaration mentioned. That the said judgment still remains in full force and effect, not in the least reversed, satisfied, or made void. Wherefore the defendants pray judgment, if the plaintiff ought to maintain its aforesaid action. To this plea there was a general demurrer filed on the 20th June 1842; and it is the questions arising under this demurrer, which the court is now called upon to determine, and they are, as presented by counsel:

1. What is the effect, within this State, of a judgment rendered in a sister State?

2. What is the nature of the appearance of the defendants under the act of 1832, ch. 280?

3. What is the nature of the plea of defendants?

The first of these questions arises out of the first section of the 4th article of the Constitution of the *United States*, which

provides, that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, *and the effect thereof*."

In execution of this constitutional authority, Congress, on the 26th May 1790, provided, by enactment, the mode of authentication, and that "the records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given them, in every court within the United States, as they have, by law or usage, in the courts of the State from whence the said records are or shall be taken."

With perfect safety it may be observed, that there is no clause in the federal constitution, the true scope and meaning of which has given rise to greater diversity of opinion, than has this one. It has passed under judicial review in almost every State in the Union, and it was found impossible to reconcile the various opinions held by learned jurists in regard to it. In the year 1813, it was considered by the Supreme Court of the *United States*, in the celebrated case of *Mills vs. Duryee*, reported in *7th Cranch*, 481. In that case it was held, whatever effect the record would have in the State from whence it is taken, it must have the same faith, credit and effect in every other court, so that if it have the faith, credit and effect of evidence of the highest nature in the court from whence it is taken, it must have precisely the same faith, credit and effect in every other court in the Union.

With every disposition on the part of the several courts of the Union to comply with the doctrine laid down in that case, still, judging from the contrariety in the decisions of the several courts, and the subsequent decisions of the Supreme Court of the *United States*, the doctrine, in many instances, has been wholly misconstrued. In some cases it was held to have established the principle, that the judgment of a State court carries with it, into every State, all its original attributes, energies and incidents, clothed with the authority of the laws under which it was pronounced, and that *in relation to judicial proceedings, in no particular* are the States to be consid-

ered as foreign to each other, and therefore no plea, other than that of *nul tiel record* would be allowed to an action on a judgment rendered in a sister State. And in support of this view, the case of *Hampton vs. McConnell*, 3 *Wheaton*, 234, has also been relied upon. In this case, the court re-asserted the doctrine to be, "that the judgment of a State court should have the same credit, validity and effect in every other court in the *United States* which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other court in the *United States*."

This decision was made in the year of 1818. In the year of 1839, the question was again brought under review of the Supreme court, in the case of *McElmoyle vs. Cohen*, 13 *Pets.*, 312, in which it was held, that although a judgment in the court of a State, is not to be regarded in the courts of her sister States as a foreign judgment, or as merely *prima facie* evidence of a debt to sustain an action of debt upon the judgment, it is to be considered only distinguishable from a foreign judgment in this; that by the first section of the fourth article of the Constitution, and by the act of May 26th, 1790, sect. 1, the judgment is *conclusive on the merits*, to which full faith and credit shall be given, when authenticated as the act of Congress has prescribed. It was also held, that there is no constitutional inhibition on the States, nor any clause in the Constitution from which it can be even plausibly inferred, that the States may not legislate upon the remedy on suits on the judgments of other States, exclusive of all interference with their merits; and, in accordance with these views, the court decided the plea of limitations, in an action instituted in one State on a judgment obtained in another State, to be a plea to the remedy, and consequently the *lex fori* must prevail in such a suit.

The late *Justice Story*, in his admirable *Commentaries on the Conflict of Laws*, *sec.* 609, deduces from all these decisions, this doctrine: "By the Constitution of the *United States*," says he, "it is declared, that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And Congress, in pursuance of the power

given them by the Constitution, in a succeeding clause, have declared that the judgments of State courts shall have the same faith and credit in other States, as they have in the State where they are rendered. They are, therefore, put upon the same footing as domestic judgments. But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was rendered, to pronounce the judgment, nor an inquiry into the right of the State to exercise authority over the parties or the subject matter, nor an inquiry, whether the judgment is founded in, and impeachable for, a manifest fraud. The Constitution did not mean to confer any new power upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. *It did not make the judgments of other States, domestic judgments to all intents and purposes;* but only to give a general validity, faith and credit to them, as evidence. No execution can issue upon such judgments, without a new suit in the tribunals of other States. And they enjoy not the right of priority, or privilege, or lien, which they have in the State where they are pronounced, but that only which the *lex fori* gives them by its own laws, *in their character of foreign judgments.*"

The view of *Justice Story* is sustained by the case of *Cameron vs. The Adm'r of Wurtz*, 4 *McCord's Rep.*, 278, a case recognised with approbation by the Supreme Court of the *United States*, in the case of *McElmoyle vs. Cohen*, and also by our own Court of Appeals, in the case of *Brengle vs McClellan*, 7 *Gill and Johns.*, 434.

The doctrine obligatory on us, on this subject, is undoubtedly contained in the authorities to which I have referred, and, if I rightly comprehend it, it is this:—By the first section of the fourth article of the Constitution of the *United States*, and the act of Congress of the 26th May 1790, it was intended, that the judgments of a State court should have to a certain extent, the character and validity of a *domestic* judgment, in every other State court in the Union. That is to say, they should have the same faith, credit and validity, as in the State where they were rendered, *so far as their existence and their conclusiveness on the merits of the original cause of action is*

*concerned*, and, therefore, not to be impeached, except on the ground of a want of jurisdiction, or of fraud. But, beyond this, they are to be considered as foreign judgments, and to be dealt with accordingly.

If this be the true doctrine, then there can be no difficulty in understanding several of the decisions cited in argument. The case in 13 *Peters*, 312, the one in 4*th McCord*, 278, and the case of *Brengle vs. McClellan*, 7*th Gill & John.*, 434. All these cases, in my apprehension, are decided on the ground, that the constitutional provision and the act of Congress, only render the judgments of sister States *domestic* judgments, so far as their existence as judgments of the State rendering them, and their conclusiveness on the merits, are concerned.

And this being so, it necessarily follows, that in the distribution of assets, the *lex fori* must govern, for it prescribes the *remedy*, and as there is no constitutional inhibition on the States in regard to the *remedy*, and no *legislation* in this State in regard to it, the *lex fori* is ascertainable only from the principles of the common law. That is to say, in the absence of any legislative enactment on the subject, (except for the purposes already indicated,) the rank and character in this State, of a judgment rendered in a sister State, is that affixed to *foreign* judgments by the common law. It is confidently believed, that these views are fully sustained by the latest decision of the Supreme Court of the *United States*, on the subject. In that case, *(McElmoyle vs. Cohen*, 13 *Peters*, 312,*)* it was held, that although by the act of Congress of 1790, judgments rendered in a sister State are made debts of record, yet they do "not carry with them into another State, the efficiency of a judgment upon property or persons, to be enforced by execution," "and that to give them the force of judgments in another State, *they must be made judgments there*," and that judgments out of the State in which they are rendered, *are only evidence in a sister State, that the subject matter of the suit has become a record, which cannot be avoided but by the plea of nul tiel record.* It was moreover held, that such judgments have *not* the force of domestic judgments, beyond the jurisdiction declaring them to be judgments, but are only

domestic judgments *as to the merits of the claim, or subject matter of the suit.* It was also decided, that such judgments, in States other than the one where they were rendered, do not take precedence of simple contract debts, unless they have assigned to them such precedence by the *local law* of such other States.

It is supposed, and it has been very ably argued to that effect by the counsel for the defendant, that the Supreme court, in deciding such judgments to have no precedence of simple contract debts, rested their decision in this regard, wholly on the supposed intention of the legislature of *Georgia*, as expressed in its enactment. To my mind it is clear, the court meant to assert the principle *independently*, of all legislation of the State, and to rest it for support on the principles of the common law. The doctrine and reasoning of the case of *Cameron vs. Adm'r of Wurtz*, 4 *McCord*, 278, are both adopted, and the court observe, in speaking of that decision, that it was "*correctly placed upon the footing, that the first section of the fourth article of the Constitution has effected no change in the nature of a judgment;*" and if possible to prevent misapprehension, the court go on to observe, that if this case had not been before them, and the point had been then presented as an original question, they would have come to the same conclusion. And this seems to be the view taken by our Court of Appeals, in the case of *Brengle vs. McClellan*, 7 *Gill & Johns.*, 443, where it is said, a judgment obtained in another State, "can rank only as a simple contract claim in the distribution of assets; the conclusive effect given to it by the Constitution and act of Congress, as a judgment not operating to place it upon an equal footing with a judgment obtained in *Maryland*, in the distribution of assets, but leaving it in this respect to the operation of common law principles, according to which it would be considered a foreign judgment, and be paid as a simple contract debt."

Now if it be true that neither the constitution nor the act of the 26th of May 1790, effected any change in the *nature* of the judgment, then it follows as a necessary consequence, that its character is precisely the same as though the Constitution

had been silent on the subject. And this being so, the question is, in what light are *foreign* judgments viewed? There can be no doubt on this subject. They have always been considered in the light of simple contracts, and being so regarded, they cannot be held to merge the original cause of action, for it is of *equal* dignity. Indeed, the whole doctrine of merger proceeds on the idea, that the simple contract has been merged in one of a *higher* dignity and grade. To use the language of *Chief Justice Tindall, in Smith vs. Nicholls*, 35 *Eng. C. L.*, 94, "the ground on which a plea of judgment recovered, bars the plaintiff from any further action, is, that the *original nature* of the debt, or damage, where it may be sought to be recovered, is changed; that he has a higher remedy: he has a judgment in a court of record on which he can issue an execution."

Now let us test this case by these principles, for the purpose of ascertaining whether there is any merger because of the judgment rendered in *Philadelphia*. *Ch. Justice Tindall* tells us that this takes place because "the *original nature* of the debt, or damage, *where it may be sought to be recovered*, is changed;" and the Supreme Court of the *United States* have decided, that the Constitution "*has effected no change in the nature of the judgment*," adopting the language of 4 *McCord*, 278, which is, that beyond the limits of the State where it is rendered, it is regarded but as a *simple contract*. From this it is clear, there is no change in the nature of the original cause of action, and therefore there can be no merger. Again *Chief Justice Tindall* tells us, that merger takes place, because the party "has a higher remedy, he has a judgment in a court of record on which he can issue an execution."

The Supreme Court of the *United States*, both in the case of *Mills vs. Duryee*, 7 *Cranch*, and the case of *McElmoyle vs. Cohen*, tell us, that a judgment rendered in a sister State, is *not* such a judgment as one on which an execution may issue in a different State.

From this examination of the nature of a judgment rendered in a sister State, and what is necessary to work a merger, it must be apparent, that the judgment in *Philadelphia* does not

work an extinguishment or merger of the original cause of action, which is the ground work of this case. And this view is *fully* and most *distinctly* taken in numerous cases.

In the case of *Smith vs. Nicholls*, 35 *Eng. C. L.*, 94, it is expressly decided, that a foreign judgment, (and I have shewn this to be such, in the attitude in which it is presented to us,) is nothing more than an agreement between the parties, to the extent of the debt or damage; and *Judge Parsons*, in the case of *Bissell vs. Briggs*, 9 *Mass. R.*, 462, (a case recognized with the highest approbation by the Supreme Court of the State of *New York*, in 5 *Wendall*, 155,) says that such judgments, *i. e.*, judgments of sister States, may be declared on "as evidence of debt or promises," thus showing that the original *nature* of the cause of action is not merged in the judgment.

But it is said, admitting this to be so, still the plea is good and the judgment a conclusive bar to this action, because it is used *defensively*.

It is undoubtedly true, that a distinction has been taken between suits brought to *enforce* a foreign judgment, and a suit brought against a party, who sets up such judgment as a defence to the suit. In the former, it is held, that no sovereign is bound to enforce a foreign judgment; but it is otherwise, where the defendant sets up a foreign judgment as a bar to proceedings. *Story's Conflict of Laws, sec.* 598.

But does this case come within this rule? Is not what is meant by setting up a foreign judgment as a bar to the suit, the pleading of such foreign judgment as shows that the right has been decided to be with the defendant, or such an one as shows that he is exonerated from *all* liability? In such a case the matter is *res judicata*, and ought to be received as conclusive evidence of right. But this is not such a case; here, the judgment plead does not establish the right to be with the defendants, but with the plaintiff, it being nothing more, to use the language of *Chief Justice Tindall*, than an ascertainment of the *amount* of the debt, and as it does not *merge* that, by giving a *higher remedy*, it can be no bar to the action. This is precisely the doctrine asserted in *Smith vs. Nicholls and in Hall vs. Odber*, 11 *East.*, 118.

Entertaining these views, it is not necessary I should consider at length the other questions raised in the case. I shall therefore merely remark, that the construction which I place on the 5th sec. of the act of Assembly of 1832, chapter 280, is, that the appearance authorized by it is, that the defendant appears both to the *capias* and the attachment, the attachment not, however, being dissolved by the appearance, but remaining as a *security;* that it is impossible to obtain a judgment, *after* appearance in the attachment, without also obtaining a judgment in the other action, the one which commences with the *capias*.

As regards the matter pleaded, I think, independently of the principles of pleading, our Court of Appeals have decided it should have been pleaded *puis darrein continuance*, if it be a defence at all. 2 *Harris and Gill*, 491, and 12 *Gill & Johns.*, 361. Moreover, I think it should have been pleaded in abatement, inasmuch as it does not show an absence of *all* cause of action, but goes upon the idea that the original cause of action is merged in the judgment, and that the remedy is on the judgment, and not on the original cause of action; and further, had the commencement and conclusion of the plea been those of a plea in abatement, instead of those of a plea in bar, as they are, it would have been bad on general demurrer, because it is not verified by affidavit, as is required by the 4*th* and 5*th Anne*, *chap.* 16. Such a plea may be treated as a nullity. 1 *John. Cases*, 397. 16 *John. R.*, 307. 2 *Dallas*, 184.

*Had* the judgment merged the original cause of action, and had it been pleaded in abatement, it could have been verified by the affidavit of counsel. *Lumly vs. Foster*, *Barnes*, 334. 1 *Bacon's Abridgment*, *Abatement*, "*O.*," 33. *Same Rep.*, 348, or it might have been exemplified by a record under the seal of the court, and authenticated under the act of Congress. 4 *Halstead*, 83.

Entertaining these views, judgment will be entered on the demurrer for plaintiff."

And thereupon, judgment on demurrer for the plaintiff was entered on the 26th of February 1846, for $300,000, damages and costs, to be released on payment of $196,481.54, with

interest from the 26th February 1846, and costs. From this judgment the defendants appealed to this court.

The cause was argued before Dorsey, C. J., Spence, Magruder, Martin and Frick, J.

By Meredith for the appellants, and
By McMahon and Brown for the appellee.

Martin, J., delivered the opinion of this court.

In this case an attachment on warrant was issued out of *Baltimore* county court, at the instance of the appellee, against the appellants on the 11th of September 1841, to recover the sum of $151,342.72, alleged to be due, upon an account stated, for money lent and advanced, and for money had and received.

The attachment was laid on certain real estate, in the city of *Baltimore*. And it appears from the record, that although the attachment was not dissolved by the execution of an approved bond, as required by the provisions of the act of Assembly, of 1832, ch. 280, yet the defendants, in pursuance of the privilege secured to them, by the fifth section of that act, appeared to the *capias* on the 26th of January 1842, for the purpose of contesting the plaintiff's claim.

On the 29th of April 1842, a declaration, *in assumpsit*, was filed by the plaintiff, to which, on the same day, the defendants filed their plea of *non-assumpsit*.

At the May term, leave was granted by the court to amend this plea, and on the 10th of June 1842, the defendants filed a special plea in bar, against the further maintenance of the action, in which they aver:

"That the plaintiff ought not to maintain its action, inasmuch as the plaintiff, after the day of issuing forth the writ in this cause, that is to say, on the 31st day of March 1842, in a certain court of record, called the district court for the city and county of *Philadelphia*, in the State of *Pennsylvania*, impleaded the said defendants, in a plea of trespass on the case, for the not performing the same identical promises and undertakings, and each and every of them, in the declaration men-

tioned. That afterwards, to wit, on the 23rd day of April, 1842, the plaintiff, by the consideration and judgment of the said court, recovered on the said plea, against the said defendants, $159,676.20, for its damages, which it had sustained on the occasion of the not performing the same identical promises and undertakings, in the declaration mentioned. And that the said judgment still remains in full force and effect, and not the least reversed, satisfied, or made void."

To this plea, a general demurrer was filed, on the 20th of June 1842. The demurrer was sustained by the county court, and the sole question presented for our consideration upon this appeal, is, that which relates to the validity of the plea, under the circumstances of the case, as exhibited by the record.

In the case of *Duffy and Mehaffy, vs. Lytle*, 5 *Watts*, 120, an action was brought upon a bond, in the district court of *Lancaster* county, in *Pennsylvania*. The defendant pleaded in bar, a former recovery for the same cause of action, obtained in a suit instituted subsequent to the action then in controversy. The plea was sustained, and we quote the opinion of the court, as containing a very full, clear, and correct exposition of the rule of pleading directly applicable to the question now under consideration. They say:

"The circumstance of this action, being brought upon the bond, previously to the one in which the judgment was entered, that has been pleaded in bar to the further maintenance in this, does not seem to furnish a sufficient reason, why the plea should not be held good: because, although the priority of an action may be a very good reason, why a judgment for the same cause shall not abate it, and why the first, when pleaded properly, should abate the second, as the plaintiff ought not to be permitted to vex and harass the defendant against his will, with two actions for the same cause; yet it is obvious that it is not the priority in the commencement of the one action, that renders the judgment obtained therein, a bar to the plaintiff's obtaining a second judgment in the other; but because the first judgment, when given, whether it be in the action commenced first or last, extinguishes the original cause of action, and gives to the plaintiff, in lieu thereof, one of a higher order. Instead

then, of the debt, as was the case here, being founded upon a bond, it became immediately upon the rendition of the judgment, though in the last action commenced, a debt of record, that could no longer be controverted. And, hence, the defendant could not, therefore, be said, to stand indebted to the plaintiffs by a bond or speciality, but by a judgment that had become a matter of record, which could not be questioned or denied."

The distinction between the plea of a pending suit, and the plea of a former recovery, was also considered in the case of *Nicholl vs. Mason*, 21 *Wend.*, 341, by the Supreme Court of *New York*. The court said;

"The pendency of another suit for the same cause of action, must be pleaded in *abatement* of a suit *subsequently* commenced; but the converse of the proposition does not hold true. The *original* or *first* suit cannot be abated, by a plea that another action for the same cause was *afterwards* commenced. But this doctrine does not overturn the plea. The defendant does not set up matter in abatement, but in bar of the action. He does not plead the pendency of another suit, but a *judgment* rendered. The plea does not go to the *form* of the remedy, but to the right of the plaintiff. It shows that the cause of action, which the plaintiff once had, is gone forever."

In the case of *Le Bret vs. Papillon*, 4 *East*, 502, it was held:

"That when matter of defence has arisen after the commencement of the action, it could not be pleaded in bar of the action generally, but must, when it has arisen before plea or continuance, be pleaded as to the further maintenance of the suit; and when it has arisen after plea, and before replication, or after issue joined, then *puis darrien continuance*."

And in *Semmes vs. Naylor*, 12 *Gill & Johns.*, 361, the Court of Appeals declared the rule to be:

"That where the matter of defence has arisen after the commencement of a suit, it cannot be pleaded in bar of the action generally; it must, when it has arisen before plea or continuance, be pleaded as to the further maintenance of the suit, and when it has arisen after issue joined, *puis darrien continuance*."

It is manifest, we think, on the principles enunciated in cases to which we have referred, that the several objections urged against the integrity of this plea; as that, it could not have been interposed, after the jurisdiction of the county court had attached by the issuing of the attachment; that the plea was in its nature, a dilatory plea, and should have been pleaded in abatement, *puis darrien continuance*, and verified by affidavit, or sustained by a production of the record, must all be overruled.

The plea has all the elements of a special plea in bar, and as its matter was not *in esse*, at the time the plea was interposed, and when there was filed to it a demurrer, and joinder in demurrer, it could not have been pleaded, *puis darrien continuance*. It was properly pleaded as a special plea in bar, against the further maintenance of the action. If the matter presented by the plea had been the pendency of a suit in another State, for the same cause of action, as in the *Trenton Bank vs. Wallace*, 4 *Halstead*, 82, it should have been pleaded in abatement, verified by the affidavit of the party, or supported by an exhibition of the record; and the proper place for such a plea, would have been in the *Pennsylvania* suit. But as we have already said, the plea before us is directed against the right to recover in the form of action adopted by the appellee, and has none of the characteristics, of a plea in abatement. And the defence relied upon by the appellant, was therefore properly introduced as a plea in bar, to the further maintenance of the action.

In the argument of this cause the counsel for the appellee contended, that the plea was to be treated as imperfect, on the ground, that there was on its face no avermement, that the court pronouncing the judgment in question had jurisdiction of the cause, and of the parties. This objection cannot be sustained.

It is certainly true, that unless the court rendering the judgment, had jurisdiction, both of the cause and of the parties, it would be treated as a nullity. It would be considered as merely void, and the party against whom it was used, could, by an appropriate plea, assail it, and put it aside, as utterly ineffectual and powerless. The right to attack a judgment, on the ground that the tribunal pronouncing it was not

invested with jurisdiction and authority; that it was inoperative and void, as being *coram non judice*, is undoubted, with respect, both to domestic and foreign judgments.

But in this case, the plea avers, that a judgment in *personam* was rendered by a court of record, styled the district court for the city and county of *Philadelphia*, in the State of *Pennsylvania*, in a suit, instituted by the appellee against the appellants, for the identical causes of action forming the subject of the present suit, and that in the said cause, judgment was rendered in favor of the plaintiff, And we consider it as an acknowledged and fixed principle of universal obligation, resulting from the comity and respect which are due from one judicial tribunal to another, that a judgment emanating from a court thus constituted, is in itself *prima facie* evidence of jurisdiction; and that it is not necessary for the party introducing the judgment to set out affirmatively in his declaration or plea, the jurisdictional facts upon which the power and authority of the court pronouncing the judgment depend.

In the case of *Robertson vs. Struth*, 5 *Adol. and Ellis, N. S.*, 942, it was held, that in an action of debt, on a foreign judgment, it was not necessary to state in the declaration, that the court rendering the judgment had jurisdiction over the parties and the cause. *Mr. Justice Patterson* said;

"We presume the judgment of a foreign court is correct; and that if there was any objection to the judgment it should be raised by plea."

In *Bissel vs. Briggs*, 9 *Mass.* 462, *Chief Justice Parsons*, when speaking of the effect of a judgment rendered in *New Hampshire*, said;

"That where the jurisdiction had attached, which, *until disproved, was always to be presumed*, the conclusion of the judgment was absolute for all purposes."

In the case of *Williams vs. Preston*, 3 *J. J. Marshall*, 603, an action of debt was brought on decree pronounced by a court in *Virginia*, against the defendant, *in rem and in personam.*

On demurrer to the declaration it was objected, that it was not shown affirmatively, that the defendant was served with notice of the pendency of the suit against him in *Virginia*, or

that he appeared to it, or defended it; and that the decree was void, and could not be the foundation of a suit. The declaration was sustained. The court said:

"That it was not necessary to aver in the declaration, that the *Virginia* court had such jurisdiction, as would authorize it to render any decree, other than one *in rem*. The comity and respect which are justly due from one State to another, would not allow the court to presume, that the tribunal which pronounced the decree in that case transcended its jurisdiction." In the cases of *Wheeler vs. Raymond*, 8 *Cow.*, 311, *and Scott vs. Coleman*, 5 *Little Rep.*, 351, the same proposition is recognized and maintained.

The objections which we have thus far examined, are those which relate to the character and structure of the plea.

The question which remains to be considered, is, whether the cause of action upon which this suit was instituted, is to be treated as extinguished by the *Pennsylvania* judgment, upon the true construction of the first section of the fourth article of the Constitution of the *United States*, and the act of Congress of the 26th of May 1790.

In the consideration of this question, it is to be assumed in the case before us, that this would have been the legal effect of the judgment in the courts of *Pennsylvania*. The cause of action here declared upon, would have been regarded as merged in the judgment, by the judicial tribunals of that State.

This is the rule of the common law, and we are not informed by the record, that there has been in *Pennsylvania* any statutory modification of the principles of that law, with respect to the doctrine of merger.

It is an acknowledged and familiar principle of the common law, that the original cause of action is considered as extinguished or merged by a judgment, when the judgment is held to be not merely *prima facie*, but conclusive evidence of the indebtment between the parties, and final, unless reversed, with respect to the subject matter adjudicated. And although there certainly has existed some diversity and fluctuation of judicial opinion, with respect to the true import of the clause in the Constitution, and the act of Congress, to which we have

referred, yet we think, that according to the interpretation which has been authoritatively placed upon them, by the Supreme Court, the judgment set forth in the plea, must be regarded as possessing the same operation and effect to which it would be entitled in the State of *Pennsylvania*. That is, that the judgment is to be here estimated in the scale of evidence, as creating a debt of record, conclusive with reference to the subject matter involved in the controversy in which it was rendered; not liable to be controverted or impeached, unless upon the grounds, that it was procured through the instrumentality of fraud, or that the court pronouncing it, was not clothed with competent jurisdiction; and necessarily producing an extinguishment of the original demand, and disabling the plaintiff from instituting upon that claim, an action of *indebitatus assumpsit*.

This question was considered, for the first time, by the Supreme Court, in the case of *Mills vs. Duryee*, decided at the February term, 1813, 7 *Cran.*, 481.

It was an action of debt in the circuit court for the *District of Columbia*, upon a judgment of the Supreme Court of *New York*, to which the defendant pleaded *nil debet*.

The plea was adjudged bad. *Mr. Justice Story*, in delivering the opinion of the court, after quoting the clause of the Constitution in question, and the act of Congress, of the 26th of May 1790, said:

"It is argued, that this act provides only for the admission of such records as evidence, but does not declare *the effect* of such evidence when admitted. This argument cannot be supported. The act declares that the record, duly authenticated, shall have such faith and credit as it has in the State from whence it was taken. If, in such court, it has the faith and credit of evidence of the highest nature, viz., *record evidence*, it must have the same faith and credit in every other court. Congress have therefore declared the *effect* of the record, by declaring what faith and credit shall be given to it. It remains only then to inquire in every case, what is the effect of the judgment in the State where it was rendered."

In the case of *Hampton vs. McConnel*, decided in 1818, 3 *Wheat.*, 234, we have again the opinion of the Supreme Court.

delivered by *Mr. Chief Justice Marshall*, in a case similar in its character, to *Mills vs. Duryee*.

It was an action of debt on a judgment of the Supreme Court of *New York*, to which *nil debet*, was pleaded.

The chief justice said;

"The court cannot distinguish the two cases. The doctrine held in *Mills vs. Duryee*, was that the judgment of a State court, should have the same credit, validity and effect in every other court in the *United States*, which it had in the place where it was pronounced, and whatever pleas would be good to a suit thereon in such State, and none other, could be pleaded in any court of the *United States*."

In the case of *McElmoyle vs. Cohen*, 13 *Peters.*, 324, the Supreme Court upon examining the import of the Constitution, and the act of Congress to which we have referred,—Say:

"Though a judgment obtained in a State court is not regarded in the courts of her sister States, as a foreign judgment, or a merely *prima facie* evidence of a debt to sustain an action upon the judgment, it is to be considered as distinguishable from a foreign judgment in this, that by the first section of the fourth article of the Constitution, and by the act of May 26th, 1790, the judgment is a record *conclusive upon the merits*, to which full faith and credit shall be given, when authenticated as the act of Congress has prescribed." * * * * * "By the law of the 26th of May 1790, the judgment is made a *debt of record*, not examinable upon its merits; but it does not carry into another State, the efficacy of a judgment upon property or persons, to be enforced by execution."

Again, the court after quoting the act of Congress, ask what faith and credit is given in the States, to the judgment of their courts?

"They are record evidence of a debt, or judgments of record, to be contested only in such way as judgments of record may be; and consequently are conclusive upon the defendant in every State, except for such causes as would be sufficient to set aside the judgment in the courts of the State in which it was rendered. In other words, if a judgment is conclusive in the

State where it is pronounced, it is equally conclusive every where in the States of the Union."

This point was directly decided by *Mr. Justice Washington*, a very eminent constitutional jurist, in the *United States* circuit court, for the third circuit, in the case of *Green vs. Sarmiento*, 3 *Wash., C. C. Rep.*, 17.

The question arose on a plea of bankruptcy, to an action of debt on a judgment of the Mayor's court of *New York*.

The contract was made in the island of *Madeira*. The defendant was discharged by the bankrupt law of *Teneriffe*, in 1801. But in 1797, a judgment had been recovered in *New York* against the defendant, in an action of *assumpsit* upon this contract.

The validity of the plea rested on the question, whether *Teneriffe* was to be considered as the place of the contract, notwithstanding the judgment; or, whether the contract, though made at *Teneriffe*, was not to be regarded by the court as merged by the judgment; and *New York*, the place of the judgment, to be treated as the place of the contract.

The solution of this question depended on the true interpretation of the Constitution of the *United States*, and the act of Congress of the 26th of May 1790.

The subject was examined with elaborate care, and great ability, by the judge who delivered the opinion. And the resolution of the court was, that the *New York* judgment was conclusive, and amounted to a complete extinguishment of the original contract, and that the certificate and discharge of the defendant at *Teneriffe*, afforded no bar to the plaintiff's demand.

In the case of *Andrews vs. Montgomery*, 19 *Johns. Rep.*, 162, an action of *assumpsit* was brought upon a judgment recovered against the defendants, in the court of common pleas of the county of *Essex*, in the State of *New York*.

The point in controversy was presented to the court upon a case stated. And it was ruled by *Mr. Chief Justice Spencer*, that the judgment was conclusive evidence of the debt claimed, and that an action of *assumpsit* could not be maintained upon it.

In delivering the opinion of the court, the chief justice, after animadverting upon the case of *Hitchcock vs. Aicken*, 1 *Caine's Rep.*, 461, and quoting, with approbation, the case of *Mills vs. Duryee*, said:

"We are bound to consider the judgment set forth in the declaration, as a debt of record due from the defendants to the plaintiff." * * * *

"The plaintiff has counted upon the judgment in *New York* as a simple contract, and, accordingly, it is set forth as a promise to pay the amount adjudicated. Now it is well settled, that *assumpsit* cannot be supported where there has been an express contract, under seal or of record." * * * *

"The judgment recovered, (19 *John.*, 165,) in *New Jersey*, being admitted by the pleadings, and standing totally unimpeached, we are bound to consider it as fairly and justly obtained, and as establishing a debt of record against the defendant. It is not therefore merely *prima facie* evidence of a debt, like a foreign judgment, but absolute and decisive of a debt. *Assumpsit* then will not lie upon it."

We have quoted largely from the prominent cases bearing upon this point, because the proposition submitted for our consideration, involves a question purely of constitutional law, depending upon authority. And we understand the principles deducible from the authorities, are:

1. That if the judgment in controversy would be regarded by the courts of *Pennsylvania* as conclusive evidence of the existence of a debt due by the appellants to the appellee, it is so to be considered in the courts of this State.

2. The result of this doctrine necessarily is, that the original cause of action was extinguished by the judgment, rendered in the district court for the city and county of *Philadelphia*, in favor of the appellee against the appellants.

3. And as a corollary from these propositions, that an action of *assumpsit* could not be maintained upon the original demand.

The case of *Brengle vs. McClellan*, 7 *Gill & John.*, 434, is not to be considered as in conflict with this doctrine.

It was there held by the Court of Appeals, that a judgment of the State of *Pennsylvania*, conclusive between the parties

in that State, and having priority over bonds, single bills, and simple contract debts in that State, as against the assets of the defendant in the hands of his executor, is considered only as a simple contract debt in the distribution of assets in this State, within the meaning of the act of Assembly of 1798, ch. 101, sub-ch. 8, sec. 17.

A proposition similar in character, was established in *McElmoyle vs. Cohen*, 13 *Pet.*, 330, and in *Cameron vs. Wurtz*, 4 *McCord's Rep.*, 278.

The correctness of these adjudications cannot be questioned. But it is perfectly manifest from the course of argument pursued in these opinions, that the doctrine enunciated was placed upon the ground, that the act of Congress of 26th May 1790, was not to be construed as investing the judgments of the States of the Union, with a general extra-territorial operation. The opinion in the case of *Brengle vs. McClellan*, is long. And we can only, in illustration of the statement, that this was the controlling view in the judgment of the Court of Appeals, refer to their language, at page 440. They say :

"The doctrine has never been carried further, than to give to the judgment of another State the same conclusive effect, and obligatory force, in every State in the Union, that it had in the State where it was rendered. To extend the principle further, and to give to it all the latitude contended for in this case, would give to the jurisdiction of our sister States, an extra-territorial operation, and put it in their power to make laws for us, not only without our consent, but contrary to our interior policy, and municipal legislation."

This unquestionably is the correct interpretation of the act of Congress. Whether under the grant of power contained in the first section of the fourth article of the Constitution of the *United States*, the right resides in Congress to give to the judgments of the sister States, for all purposes, extra-territorial force, is not the question. This power has never been exerted by the national legislature.

And it is now settled, to use the words of the Supreme Court, in *McElmoyle vs. Cohen*, 13 *Pet.*, 325 :

"That although by the act of Congress, the judgment is made a debt of record, not examinable upon its merits; it does not carry with it, into another State, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State, it must be made a judgment there; and can only be executed in the latter, as its laws may permit."

And again, at page 326, where it said:

"The judgment is put upon the footing of a domestic judgment; by which is meant, not having the operation and force of a domestic judgment, beyond the jurisdiction declaring it to be a judgment, but a domestic judgment as to the merits of the claim, or subject matter of the suit."

The doctrine of the case of *Brengle vs. McClellan* has not been controverted; but we do not understand it as impairing the position assumed by the counsel for the appellants, that the original cause of action is to be considered as extinguished by the judgment rendered in *Pennsylvania*.

On the contrary, the principles announced by the court in that case fortify this position.

It was there held, that if the judgment was conclusive, upon the merits, in the State where it was pronounced, it would be regarded as equally conclusive in the *Maryland* courts.

And if it be true, that the judgment possessed in the State where it was rendered, the attribute of conclusiveness; that it had there the rank and dignity of a debt of record; that it was not re-examinable, and could not be controverted, with respect to the merits of the original demand; that the parties were precluded from going behind the judgment into an investigation of the original cause of action; and that, by the act of Congress of the 26th of May 1790, the same effect is to be attributed to the judgment, by the courts of *Maryland*, when it is introduced into the tribunals of that State as evidence, or relied upon in pleading, to which it would be entitled in the State where it was pronounced; and that it has all the operation and force in *Maryland* that could be claimed for it in *Pennsylvania*, as conclusive, in relation to the merits of the claim and the subject matter of the suit; it follows as an irresistible conclusion

upon the undoubted principles of the common law, that it must operate here as an extinguishment of the original demand.

We think it therefore to be clear upon the true exposition of the first section of the fourth article of the Constitution of the *United States*, and the act of Congress passed in execution of the power granted by the Constitution, and the doctrine of extinguishment, as established by the common law, that the appellee could not have maintained an action of *assumpsit*, upon the cause of action exhibited in the record, if the judgment set forth in the plea had been obtained in *Pennsylvania*, prior to the commencement of the suit. And we have already said, when considering the question of pleading involved in this case, that although the judgment relied upon as extinguishing the original claim, was obtained after the institution of the suit, the defendants were authorized to plead it specially in bar against the further maintenance of the action.

It has been stated, that the appellants appeared to this action, by virtue of the provisions of the fifth section of the act of Assembly of 1832, ch. 280. The language of the section, is:

"That when by virtue of this act, any attachment shall issue against the lands, &c., of any corporate body, the said corporate body may, in cases where a natural person, if defendant, might, by entering special bail to the action, dissolve such attachment, dissolve the same by entering into bond with security, for paying and satisfying the judgment that may be rendered against said corporate body in the said cause; and said corporate body may appear in the said case of attachment, and by pleading, and otherwise, contest the claim of the plaintiff, although no dissolution, as aforesaid, shall have taken place; the said attachment however, remaining and continuing in full force and effect, and upon the issues or pleading on the part of the corporate body, judgment on the cause of action may be recovered against the said corporate body, as well as judgment of condemnation in the attachment."

And the counsel for the appellee have contended, that it was not the purpose and aim of the special privilege conferred by this statute, to let in a plea like that which has been pleaded by the appellants.

This position, we think, cannot be sustained. The corporation is authorized by the act to appear to the attachment, and contest the claim of the plaintiff, by pleading or otherwise.

The appellants appeared in this suit, and contested the claim of their adversary by interposing a plea, which, as we have seen, is to be characterized as a plea in bar, directed to the foundation of the action; and it would be impossible to deny to the corporation the right of introducing a plea of this character, without interpolating into the statute new terms and provisions.

Under the act of 1832, if a bond is not given by the corporation, the attachment stands as a security for the debt, upon the contingency of the plaintiff obtaining against the defendant a judgment *in personam*. *Barr vs. Perry*, 3 *Gill Rep.*, 313.

After the appearance of the defendant, two suits are placed upon the docket; and the questions in the action of *assumpsit*, are to be determined irrespective of the attachment.

A plea which would be regarded as an answer to an action of *assumpsit*, if unaccompanied by an attachment, must be treated as valid, notwithstanding the controversy originated in a proceeding of that kind. We think, therefore, that the judgment of the county court must be reversed.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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DAVID STEWART, PERMANENT TRUSTEE OF JOHN L. AND WILLIAM L. HAMMOND, *vs.* UNION BANK OF MARYLAND AND JOHN P. MCCORMICK.—*December* 1848.

It is for the legislature and not for the courts to judge, what shall be, at any particular period, the policy of the insolvent system. The business of courts is faithfully to interpret the laws, without any regard to the private notions of the judges touching the policy of this or that provision.

Prior to the act of 1834, ch. 293, payments *eo nomine*, by an insolvent debtor, no matter what his views or expectations might be, were not declared to be fraudulent or void.

The acts of 1812, ch. 77, and 1816, ch. 21, though avoiding many acts done by an insolvent, yet do not include in the number an actual payment of money, *bona fide* due by him.

In this case it was HELD, that the payment of a debt, in June 1832, by parties at that time in failing circumstances, and who, in October of the same year, applied for the benefit of the insolvent laws, was not void under the insolvent system as it then existed.

APPEAL from the Court of Chancery.

The original bill in this case, was filed on the 7th of July 1834, by the appellant, *Stewart*, as permanent trustee of *John L. & William L. Hammond*, insolvent debtors, against the *Union Bank of Maryland*. It charges that said insolvents, before their application, as partners in trade, became indebted to the *Union Bank of Maryland* for money borrowed, in the sum of $5000, for which, on the 21st of February 1832, they gave their note signed in their partnership name, payable to the bank, by its corporate name, at sixty days; that becoming embarrassed in their circumstances, and insolvent, they were unable to meet this note, at its maturity, and having dissolved partnership, they gave a new note on the 24th of April 1832, in their individual names, payable to the cashier of the bank, at twenty-eight days: that their condition of insolvency continuing, until the new note matured, they paid it, with a view and under an expectation of being or becoming insolvent debtors, and with intent to give to the bank an undue and improper preference over their other creditors; and prays for a decree, compelling the bank to pay over said sum of $5000 to the complainant, as trustee, to be distributed among the creditors of the insolvents.

The answer of the bank, filed on the 3rd of November 1844, states that the loan of the $5000 was made to the *Hammonds*, upon a pledge of the stock of the bank, made by one *James McCormick*, in pursuance of an agreement to that effect; that, when the last note fell due, (22nd and 25th of May 1832,) it was not paid by either of the parties to it, until the 25th of June following, when said *McCormick* paid the same, and respondents released the stock which had been pledged for its payment, and delivered up the note to him.

An amended bill was then filed, making *McCormick* a party, and charging that if he did make the payment, as stated in the answer of the bank, he was furnished with the means for that purpose, by the *Hammonds*, at a period, when they had a

view, or were under an expectation, of being or becoming insolvent debtors, and with intent thereby, to give said *McCormick* an undue and improper preference.

The answer of *McCormick*, filed on the 14th of July 1835, admits that the money with which he paid the bank and relieved his stock, which had been hypothecated as security for the said note, was placed in his hands by the *Hammonds* for that pupose, two days before he made the payment, but avers that he had no knowledge of the business or engagements of the *Hammonds*, or who were their creditors, at the time of their application for the benefit of the insolvent laws.

It was admitted, by agreement, that *John L. Hammond* petitioned for the benefit of the insolvent laws on the 15th of September 1832, and *Wm. L. Hammond* on the 15th of October 1832, and that both received their final discharge on the 2nd of February 1833; that they filed their lists of debts due by them as partners, to an amount exceeding $40,000, and debts due to them, to the amount of $14,161.50. *William L. Hammond* died in 1838, and *McCormick* in 1841, and a bill of revivor was filed on the 5th of February 1846, against his administrator, *John P. McCormick*, which was answered by him on the 18th of July 1846.

The only witness examined under the commission, was *John L. Hammond*, one of the insolvents, sworn on the part of the complainant, who proved that the partnership was dissolved in the winter or spring of 1832, at which period he is unable to speak as to its solvency. That the firm did not expect to stop payment at the time of its dissolution, but, that being disappointed in not receiving $20,000, which *McCormick*, the father-in-law of *William L. Hammond*, had promised to loan them, their notes lay over, he thinks, on the 21st of May 1832: that they had not available means to pay their debts, but that they had bills receivable, out of which, he understood a provision was made to pay to the *Union Bank*, the note in question. This arrangement was made by deponent, his brother *William*, their clerk, and the said *McCormick*. That deponent objected to the arrangement so made, because they expected to compound with their creditors, and he did not wish to give a

preference to one over another, but to make an equal distribution of their assets among their creditors.

The chancellor, (JOHNSON,) on the 24th of July 1847, passed a decree, dismissing the bill, from which this appeal was taken by the complainant.

The cause was argued before DORSEY, C. J., SPENCE, MAGRUDER, MARTIN and FRICK, J.

By DAVID STEWART and ALEXANDER, for the appellants, and

By T. P. SCOTT, and WM. H. COLLINS, for the appellees.

MAGRUDER, J., delivered the opinion of this court.

With all the attention we have given to the matters disclosed in this record, we can discover no ground for a reversal of the chancellor's decree.

The material facts in the case, according to our view of it, are these. The appellant is the permanent trustee of *John L. and William L. Hammond*, and in that character filed his bill of complaint in the court below, to obtain a decree, declaring to be fraudulent and void a payment of $5000, alleged in the original bill to have been made by those insolvents, to the *Union Bank of Maryland*, and by the amended bill to charge *McCormick*, (now deceased,) with this money, if the *Union Bank of Maryland* be not, (for the reasons suggested,) liable therefor.

It appears that the two insolvents were in partnership in the year 1832, when a loan of $5000 was made to them by that bank. The note originally given by them was renewed, and the latter became due 22–25 of May, of that year. It was not paid at maturity, nor until the 25th June, when the same was paid to the bank by *McCormick*, he having been furnished with the means of paying it by the drawers.

*McCormick* induced the Bank to lend the money to the *Hammonds*, but did not endorse the note. By the terms of the agreement however, into which he entered with the bank, he was to pledge stock of that institution for the same. The

note being paid off as stated in the record, this stock was released, and the note given up to *McCormick*.

This payment to the bank of the amount of its note, it is charged, was in fraud of the creditors of the insolvent, and in contravention of the intent and policy of the insolvent laws of the State. Because of this, it is insisted, that the complainant, as the trustee, is entitled to the relief which he asks. The chancellor said that he is not. In so saying did he err?

This court has repeatedly had occasion to say that, according to the common law, a debtor has a right to prefer one creditor to others. It cannot then be pretended that the payment, admitted in these proceedings to have been made, is void, unless there be in our insolvent laws some clause which makes it so. We must take care in examining this case, to bear it in mind, that it is for the legislature, and not for the court to judge, what shall be at any particular period, what is called the policy of the insolvent system. Provisions whereby to guard against fraud, in the acts of insolvents have varied from time to time, and none are ignorant that even intelligent and honest men, differ in this matter. Our province is *jus dicere*, (of the case under consideration,) and not *jus facere*. The court cannot create the offence, nor proportion the punishment to the offence, when the law makes the act done, to be an offence. A correct judge takes it for granted, that the wisdom of the law, (its constitutionality not being questioned,) is superior to his wisdom, and in deciding any question, especially one arising under our insolvent laws, (the provisions of which have been so frequently changed,) must take care to ascertain what the legislature, in its wisdom, made the law at the time when the act complained of was done, and not at any other time.

These remarks are intended as a brief answer to very many of the arguments which we heard pending the discussion of this case, all of which, (although entitled to grave consideration, when urged in the legislative hall,) seem out of place when addressed to this *forum*.

A few sentences, borrowed from *Justice Story*, in his work on equity jurisprudence, will furnish an answer to some other remarks which have been occasionally introduced. "It is not

upon the feelings which a delicate and honorable man must experience, nor upon any notion of discretion, to prevent a voluntary gift, or other act of man, whereby he strips himself of his property, that courts of equity have deemed themselves at liberty to interpose in cases of this sort. They do not sit, or affect to sit, in judgment upon cases as *custodes morum*, enforcing the strict rules of mortality, but they do sit to enforce what has, not inaptly, been called technical morality. Courts of equity, therefore, will not set aside an act or contract, merely because a man of more honor would not have entered into it."

There may be, it is true, "surrounding circumstances which ought to assist us in our judgment, but then we must not surround the case by too many circumstances; with circumstances which ought to have no influence upon our minds in settling the matters in issue." The question is not, of what number of unbecoming acts the defendants were guilty, but, whether in this act there was, according to the proof, any thing for which it is the duty of this court to say, that this payment to the bank, as stated, was forbidden by our insolvent laws, and because of this, the same sum is to be paid either by the bank or by *McCormick*, to the trustee, and to constitute a part of the general fund, to be distributed in just proportions among the creditors.

Now it is not, and it is presumed cannot be denied, that until the act of 1834, ch. 293, "payments *eo nomine*, by an insolvent debtor, no matter what his views or expectations might be, were not declared fraudulent and void. It is also certain, that our courts cannot, in order to apply that act to their case, assume that law to have passed a few years sooner, or the insolvency of the *Hammonds*, and the act complained of, to have taken place a few years later, than was the case. He then who asks us to condemn the act as fraudulent, and to declare that the complainant is entitled to a decree, that the money be paid to him, must show the law, which without using the word payment, declares by a different word or phrase, the thing done (the payment of this note,) to be fraudulent and void. It is not an unreasonable belief, that this may be the only point in the very able arguments which have been made to us, in behalf of the appellants, which has not been satisfactorily demonstra-

ted. In this part of it however, there may be a defect, and possibly, this defect may have been discovered by the legislature, and have led to the act of 1836.

We all know that our insolvent laws were designed to prevent frauds and undue preferences, sometimes by depriving the insolvents of the relief which they sought, without affecting the right of the creditor who is preferred, and sometimes by making void the instrument which would secure the preference, without depriving the debtor of the relief which the insolvent system designs to give to every honest debtor, who applies for it. The question then, now is, whether there was in 1832, any act of Assembly of *Maryland*, which made void the payment here complained of, and of course entitles the complainant in this suit, to the money here in controversy? Neither the researches of counsel, nor our recollections or labors, furnish the law which is wanted for this case.

The right to relief, it seems almost to be admitted, must be given, if given at all, by the act of 1812, ch. 77, 1st sec., and 1816, ch. 21, sec. 6. But these acts of Assembly, although they avoid many acts, when done by an insolvent, yet do not include in the number, an actual payment of money *bona fide* due by him. All deeds, conveyances, transfers, assignments and sales, of any debts, rights, or claims, with a view, and under an expectation of being or becoming an insolvent debtor, and in order to give an undue and improper preference, are declared by the act of 1812, to be null and void. The act of 1816, in declaring what acts it makes absolutely null and void, uses only the words, "all deeds, conveyances, transfers, assignments or sales of any property, real, personal or mixed, or any debts, rights or claims, with a view," &c. Now it is evident, that in neither of these acts of Assembly are payments, or any words or phrases significant thereof, to be found among the acts declared to be null and void. This may be a defect in the law. It may be as *impolitic* to allow debtors in failing circumstances to pay the debt in money, as to quiet the supposed demands of the creditors, in any of the ways forbidden. But this is a question only to be decided by the Legislature, just as to that department of the government, it may seem at

any time most for the interest and well being of the community. The business of courts is to learn that will, from the words used by the Legislature; to make it known, and to interpret it faithfully, without any regard to the private notions of the judges, touching the policy of this or that provision.

It will at once be seen, by an examination of our insolvent system, that our Legislature has acted with great caution, in forbidding acts, which, in themselves, certainly are not criminal, (the security or payment of *bona fide* debts,) and in determining under what circumstances such acts shall be deemed unlawful. According to its notions of sound state policy, it would seem, that very many acts of debtors, in failing circumstances at the time, and who expected to become, and afterwards did become applicants for the benefit of our insolvent laws, might be prohibited, while, as yet, actual payments it would be unwise to forbid. Until 1836, there is manifest, in all our insolvent laws, a reluctance to interfere with the right of the creditor to demand, threaten to sue, sue for, or collect, an honest debt—a fondness for the old law maxim, which gives a preference, *vigilantibus*, and leaves it *dormientibus*, to suffer, if loss and injury to them, be the consequence of their negligence.

Very many other points have been deliberately argued at the bar, but a decision of them is unnecessary in this case.

DECREE AFFIRMED.

JUNE TERM, 1849.

WILLIAM J. ALBERT, AND EMILY J., HIS WIFE, *vs.* WILLIAM WINN, JAMES ROSS, ET AL.

A bill was filed in chancery on the 14th of September 1846, by the creditors of *J*, alleging his insolvent condition, and that he designed to give an undue preference to certain of his creditors, especially *A and wife*. Upon this bill an injunction was granted, restraining *J* from giving, and *A and wife* from receiving, any such preference. On the 29th of the same month, *A and wife* filed a bill on the equity side of *Baltimore* county court, alleging *J's* indebtedness to them on account of his misapplication of certain

trust funds belonging to the wife of *A*, and his promise to secure them by a conveyance of certain real estate, which he had failed to do, and praying that he might be decreed to pay them the sum thus due under the trust. *J* answered this bill, admitting its averments, and on the 31st of October following, a decree was passed by *Baltimore* county court, directing *J* to bring into court the amount ascertained and admitted to be due to the complainants. HELD:

That the original bill of the 14th of September, drew to the court of chancery the whole litigation in regard to the distribution of *J's* estate; that the proceedings of *A and wife*, in *Baltimore* county court, were in violation of the chancellor's injunction, and that it was competent for the court of chancery to restrain, by injunction, the execution of this decree, and treat the whole proceeding in said county court as a nullity.

The case of *Ellicott vs. U. S. Insurance Company*, *ante* 307, is distinguished from this case, and is not in conflict with it.

The appropriate remedy for *A and wife* was, in chancery, on the original bill, that court having ample power to afford them the relief which they sought in another form, in another court of concurrent jurisdiction.

In this case the court decided, that a deed conveying all the grantor's property to certain trustees, in *trust*: 1st. To defray the expenses attending the execution of the trust. 2nd. To the payment of the several creditors named in the schedule annexed to the deed. 3rd. To the payment of the claims of such creditors as shall, on or before a given day, execute and deliver to the trustees full and absolute releases and acquittances of such claims; and 4th. If any surplus shall remain, to apply the same to the satisfaction of the claims of all other creditors of the grantor, without distinction or priority, was fraudulent and void, both at common law, and under the statute of the 13*th of Elizabeth*.—[*See note at the end of the case.*]

Upon review of all the authorities, it was the opinion of the court in this case, that a deed which does not fairly devote the property of the debtor, in desperate circumstances, to the payment of his creditors, but prescribes to them the terms upon which they shall receive part payment, is, in law, fraudulent and void.

Where a conveyance is good in part and bad in part, as against the provisions of a statute, it is void *in toto*, although there be no fraud intended.

APPEAL from the Court of Chancery.

On the 14th of September 1846, *Johns Hopkins and others*, creditors of *Samuel Jones*, filed a bill in chancery against said *Jones*, the appellants, *Albert and wife*, and one *Michael S. Norman*, alleging that *Jones* who had been trading under the name of *Talbot Jones & Co.*, was indebted to the complainants and others, in the large sum of $200,000, whilst the whole of his assets did not amount to more than $100,000;

that being thus hopelessly insolvent, and knowing himself to be so, and having no reasonable expectation of being exempt from liability or execution, on account of his debts, without applying for the benefit of the insolvent laws, and designing and threatening to prefer certain of his creditors, his near relations, said *Jones* was about to transfer a large portion of his property to his brother-in-law, and sister, *(Albert and wife,)* and to said *Norman*, also his brother-in-law, with the intent thereby to give them an undue and improper preference over the rest of his creditors. That complainants being about to institute suit against *Jones*, to compel him to apply for the benefit of the insolvent laws, he had changed his residence, that he might the longer delay his creditors, and better secure to his favorite creditors, the preferences which he contemplated. The bill then proceeds to state, of what the property and effects of said *Jones* consisted, and prays that a receiver may be appointed, to take charge of the same, until a trustee in insolvency should be appointed, and for an injunction to restrain said *Jones* "from conveying, assigning or transferring, any of his property or effects, rights or credits, to the said *Albert and wife*, and *Norman*, to secure or pay the debt due to them, in preference to the rest of his creditors, and to restrain the said *Albert and wife* and *Norman*, from receiving any such preference."

Exhibits of the indebtedness of *Jones*, being filed with the bill, it was on the same day submitted by the register, to *Cornelius McLean* a solicitor in chancery, (the chancellor himself being absent,) who endorsed thereon as follows: "I have read this bill and think that an injunction ought to issue.—*Cornelius McLean*, solicitor."

The injunction was then issued as prayed, and served upon the defendants; and the granting thereof was approved by the chancellor, (BLAND,) on the 8th of October 1846, by order, endorsed upon the bill.

On the 29th of September 1846, the said *Albert*, and *Emily his wife*, filed a bill on the equity side of *Baltimore* county court, against said *Samuel Jones*, alleging that complainant, *Emily*, was *cestui que trust*, under the will of her late father *Talbot Jones*, of a large amount of stocks and other property:

which the said *Samuel* held as trustee for her use, a large portion of which property he had appropriated to his own use; that the amount of this trust fund for which said *Samuel* was responsible to complainant, was $24,319.34. That in November last, complainants applied to said *Samuel* to replace this trust fund, or to substitute for it property of equal value, and that he then promised and pledged himself, to grant and convey to your oratrix *Emily*, certain property known as the "*Wheatfield Inn*," which conveyance has never been made. This bill then prays that said *Samuel Jones*, may be decreed to pay to the complainants the sum of money thus due to them under said trust, and misapplied by him to his own purposes. On this bill a *subpoena* was issued and served upon the defendant, and made returnable on the 1st of October then next, on which day *Jones* appeared by counsel, but failing to answer, an interlocutory decree, under the act of Assembly, was passed on the 6th of October, and on the same day a commission to take testimony was issued, under which various testimony in relation to the trust fund and the amount thereof, was taken, and returned on the 8th of the same month.

On the 22nd of the same month, (October 1846,) the same parties, *Albert and wife*, filed a second bill in the same court, against the same defendant, *Jones*, of the same import as the first, respecting the debt due on the trust fund; and further charging, that said *Jones*, being largely indebted, is about to convey to trustees, for the benefit of such of his creditors as will give him releases of their claims, all his property, including the "*Wheatfield Inn*," upon which complainants claim an equitable lien for the reasons stated in their former bill. This bill then prays for an injunction restraining said *Jones* from conveying to any person or persons whatever his property and effects, and especially the "*Wheatfield Inn*." An injunction was, on the same day, issued as prayed, which was afterwards, on the 26th of the same month, by agreement, modified, so as to affect only the "*Wheatfield Inn*" property.

On the 30th of the same month, (October 1846,) *Jones* answered the first bill of *Albert and wife*, admitting his indebtedness to the complainant, his sister *Emily*, and his appropriation

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of her trust money, and his promise to reinstate the same by a conveyance of the "*Wheatfield Inn;*" and further stating, that since the filing of this bill he had conveyed all his property, except said "*Wheatfield Inn,*" to *James Ross and William Winn*, "for the general benefit of his creditors." The court, (LE GRAND, J.,) on the next day, (31st of October 1846,) passed a decree, directing *Jones* to bring into court forthwith, the sum of $24,319.34, to be paid to complainants, for the use and benefit of the said *Emily J. Albert*, and the other *cestuis que trusts* mentioned in the will of *Talbot Jones*, deceased.

On the 4th of November following, *Winn* and *Ross* filed their petition, praying the court to strike out the above decree, and that they might be made parties defendants to the bill. This petition states, that *Jones*, on the 26th of October last, conveyed by deed, all his property, except the "*Wheatfield Inn,*" to the petitioners, for the benefit of his creditors generally, and had covenanted to convey that property also, as soon as the injunction forbidding him to do so should be dissolved, and therefore the petitioners are interested in the object of said bill. This petition also discloses the fact of the filing of the bill in chancery, of the 14th of September 1846, by *Johns Hopkins*, and others, creditors of said *Jones*, and the granting of the injunction thereon, and charges, that the bill in this case was filed, and the proceedings thereunder were had with a fraudulent intent and design to evade said injunction of the court of chancery, the existence of which was purposely concealed by the parties, from the knowledge of this court. It further states, that *Jones* expressly agreed, on the 28th of October, with the solicitor of your petitioner, that his answer should not be filed before the ensuing Saturday morning, at 1 o'clock, and that this delay was asked and granted for the avowed purpose of enabling your petitioners to obtain a copy of the deed executed by *Jones* to them, in order that it might be made the foundation of an application by them to be made parties defendants therein.

*Jones*, by his answer to this petition, denies all fraud or concealment, and in regard to the agreement respecting the filing

of his answer, states, that he considered the delay asked for, was merely for the purpose of procuring a copy of the deed to be filed with his answer, and having afterwards learned from *Mr. Glenn*, one of his counsel, that this was unnecessary, he filed his answer, simply stating the fact, that he had made the deed. The complainants, *Albert and wife*, also deny all fraud and concealment, and aver their entire ignorance of any agreement or understanding respecting the filing of *Jones'* answer.

On the 19th of December 1846, the court, (LE GRAND, J.,) passed an order, dismissing this petition, and delivered the following opinion:

"The petition states, that the petitioners are trustees, under a deed executed by *Jones* for the benefit of his creditors, and asks that the decree heretofore passed in the cause may be opened, and the petitioners made parties thereto. The bill was filed on the 29th September last. It alleges in substance, that by the last will and testament of *Talbot Jones*, deceased, (father of the complainant, *Emily J.,)* a trust was created in her behalf, and that the defendant *Jones*, as surviving trustee of the said *Emily*, used for his own purposes the trust fund, and that he promised after the application of the fund to his own purposes, to secure the same to the complainants, by the conveyance of a certain property in the city of *Baltimore*, known as the "*Wheatfield Inn*," but he has never made such conveyance in compliance with said promise. The bill then prays, as for relief, that the court will decree the payment by *Jones*, of the amount so misapplied to his own uses, which is set out and declared in the bill. There is no prayer for the specific performance of the alleged contract of *Jones*, to convey the "*Wheatfield Inn.*" Subsequently an interlocutory decree was passed, and testimony taken under it. On the 30th of October, *Jones* filed his answer, in which he admits the bequests as contained in the will of his father, and stated in the bill, and that "he used the stocks and moneys as alleged in said bill, belonging to the said *Emily*, and so held by him in trust," he also admits the agreement to convey the "*Wheatfield Inn*" as stated in the bill, and he submits to such decree in the premises, as this court may make. On the 31st of

October, this court signed a decree. On the 4th November, on the petition of the petitioners, *Ross* and *Winn*, this court passed an order suspending said decree, until its further order. By the petition and accompanying copy of the bill, it appears that *Johns Hopkins* and other creditors of *Jones*, filed their bill in the court of chancery, on which an injunction issued, enjoining and prohibiting the said *Jones* from conveying, assigning or transferring any portion of his property or effects to the said *William Albert*, or *Emily his wife*, or to any other of the creditors of *Jones*, or to any one in trust for them, to secure or pay the debts due from *Jones* to them, &c. This bill was filed on the 8*th October* 1846. On the 22nd October, *on* another bill, this court enjoined *Jones* from conveying his property to any one. On this state of the case, counsel have argued many questions, which, with all respect for their opinions, do not appear to the mind of the court, to be involved in the proceeding. It will be time enough to consider them when they properly arise. It is insisted by counsel for petitioners, that owing to the fraud and concealments of the complainants and defendants, this court was not informed of the interest of the petitioners in this proceeding, and this allegation rests upon the fact of an arrangement having been entered into by the defendant *Jones*, and one of the counsel of the petitioners, that he, *Jones*, would not file his answer before a certain day. So far as the complainants are concerned, they not only deny all fraud and concealment, but aver they were ignorant of any such agreement or understanding, and there is not a particle of testimony to show the contrary. *Jones* also denies fraud, and shows what he considered the meaning and purport of the agreement. On these facts, there might possibly be made out a case of mistake, but not of fraud.

It has also been contended, that this proceeding has been in violation of the injunction issued by the chancellor; if this be so, this court is unable to perceive the fact. The injunction only prohibited *Jones* from giving, and the complainants from receiving from him a conveyance of any of his property, &c. There has been no such conveyance by *Jones;* all that has been done by the complainants, is the prosecution of a suit,

commenced before the high court of chancery was applied to by the creditors of *Jones*. How this can be considered an infraction of the injunction, it is impossible to perceive. It might, however, be a very serious question, whether these petitioners have not violated that injunction by taking the deed from *Jones* before the injunction was dissolved; and if they have, then it is manifest they have no standing under that deed in any court: but as this question is not necessarily involved in this case, the court will avoid the expression of any opinion in regard to it. Did however the court consider the other creditors of *Jones* entitled to be made parties to this suit, it would be compelled to consider and decide on the validity of the deed to *Jones;* but regarding the proceedings as but an ordinary one, in which the *cestui que trusts* are only seeking to compel the trustee to make good the funds which he has misapplied, it is difficult to perceive what other parties have to do with it. The amount of the debt is alleged in the bill, and is admitted, as is also the misapplication of the trust fund, in the answer. Had a suit been instituted at law, on a matter perfectly cognizable by it, for instance, on a promissory note, the defendant admitting his handwriting, how would such court receive the opposition to the rendition of a verdict by a jury, for the amount of the note, on the ground, that the defendant had other creditors, and that he was unable to pay all the full amount due to them? Would such a defence, either from the defendant, or from third parties, be listened to? To such a question no answer is required, for it answers itself. The judgment would be entered up on the verdict, and those who thought they could deprive it of its efficiency, would have to institute proceedings to that end. To the mind of the court, this case involves precisely the same question.—If *Jones* ever becomes an applicant for the benefit of the insolvent laws, his permanent trustee may, if he thinks he can do so successfully, call these complainants to an account, on the ground that they have received an undue and improper preference; but until such an event occurs, this court knows of no right in one creditor to object to another obtaining a decree or judgment in the regular course of judicial proceeding. But it has been sup-

posed and so argued, that this decree has not been obtained regularly, that is to say, the case was never submitted. The answer admits all the facts in the bill, for which the bill prays a decree, and submits to the court to pass such a decree as it deems proper. If such a proceeding requires to be set down for hearing, then at least one-half the decrees passed by this court are erroneous. But the practice has been uniformly different. Where there is no denial of the equity stated by the bill, and submission to a decree in the answer, the court has always, so far as I know, and from inquiry have been informed, considered the case ready for decree. Such the court considered this case to be, and dealt with it accordingly. The decree has been drawn up inartificially, and requires some slight reformation, which will be made *nunc pro tunc*. It was in the bosom of the court from the day it was signed, the court having promised *Mr. Dulany* so to consider it on the day it was signed. Entertaining these views, it is thereupon ordered, this 19th day of December A. D. 1846, that the petition of *Ross* and *Winn* be, and the same is hereby dismissed with costs."

On the 13th of January 1847, *Winn* and *Ross*, and the complainants in the original suit of *Hopkins and others*, of the 14th of September 1846, filed their bill in chancery against *Albert and wife*, *Jones* and others, stating the object of the original suit, and the injunction thereon, and the subsequent proceedings of *Albert and wife* in *Baltimore* county court, resulting in the decree of that court, of the 31st of October 1846, and seeking to set aside the same as fraudulent and void against the complainants, and to stay, by injunction of the court of chancery, execution thereof, against any property of *Jones*. This bill sets forth the deed of *Jones* conveying to *Winn* and *Ross* all his property, for the benefit of his creditors, and avers, that the same is valid and operative, and vests the title of all of *Jones'* property in said trustees. It avers, that the decree of *Baltimore* county court was fraudulently obtained, and designed and contrived, to give to the parties obtaining it, an undue and improper preference over the rest of the creditors of *Jones*. It prays, that the "*Wheatfield Inn*," as well as the rest of the property of said *Jones*, may be declared charged, in the hands

of the trustees, with the payment of the debts, as expressed in the deed, and that the trustee may be permitted to account for the trust property under the direction of this court, which the bill asks shall assume jurisdiction over the whole subject, with a view to the distribution of the estate amongst the creditors, upon just and equitable principles. It also states, that *Jones* had applied for the benefit of the insolvent laws, on the 11th of January 1847, and that a provisional trustee had been appointed.

The deed of *Jones* to *Winn* and *Ross*, is filed with this bill as an exhibit. It is dated the 26th of October 1846, and conveys to the grantees, "all the property, estate and effects whatsoever," of the grantor, except the "*Wheatfield Inn*," *in trust*, to sell the same, and apply the proceeds as follows: "*First*, to defray the costs and charges attending the execution of this trust, including a commission of eight *per cent* on the amount collected, to be retained by the trustees for their trouble in executing this trust." "*Secondly*, to the payment to the several creditors named in the schedule hereunto annexed, of the sums of money thereby admitted to be due to them respectively, the aggregate of said sums amounting to $4801.33;" and "*thirdly*, to the payment of the claims of such of the creditors of the said *Samuel Jones, Jr.*, (whether contracted by him in the prosecution of his aforesaid trade, or otherwise,) as shall, on or before the first day of January next, execute and deliver to the said trustees, full and absolute releases and acquittances to the said *Samuel Jones, Jr.*, of and from the aforesaid claims, and if the proceeds of the aforesaid funds, remaining after satisfaction of the preceding trusts, shall prove unequal to the payment in full of the claims of the creditors releasing as aforesaid, then the same proceeds shall be distributed amongst such creditors so releasing, ratably and proportionably to the amounts of their respective claims, and if any surplus shall remain, after satisfying the aforesaid creditors, then, *fourthly*, to apply the same surplus to the payment and satisfaction of the claims of all the creditors of the said *Samuel Jones, Jr.*, without any distinction or priority whatever." It also contains a covenant on the part of *Jones*, that, whenever the injunction restraining the transfer of the

"*Wheatfield Inn*" shall be dissolved, he will convey the said property to the same parties, "to be held by them upon the same trusts, and with the like powers, as the estate and property hereby conveyed."

An injunction restraining further execution of the decree in *Baltimore* county court, was then issued as prayed.

The answers of *Jones*, and of *Albert and wife*, to this bill, deny all fraudulent combination charged in relation to the proceedings in *Baltimore* county court, and aver that the decree of that court is valid and effectual, as a decree of a court of competent jurisdiction, fairly and *bona fide* rendered, and that it can only be annulled, if there be error in it, upon appeal to a superior tribunal. The answer of *Albert and wife*, also denies the validity of the deed executed by *Jones* to *Winn* and *Ross*, on the 26th of October 1846.

On the 18th of January 1847, *Albert and wife* filed their answer to the original bill of *Johns Hopkins*, *and others*, alleging the same facts in defence, as they had before averred in their bill of complaint in *Baltimore* county court.

On the 28th of April 1847, the complainants, *Winn* and *Ross*, filed their petition in the cause, stating, that since the filing of their original bill on the 13th of January 1847, they had been appointed permanent trustees of said *Jones*, and praying leave by an amended or supplemental bill, to set out their title as such permanent trustees.

This petition was resisted by the defendants, but the chancellor, (Johnson,) on the 30th of April 1847, passed an order, permitting a supplemental bill to be filed without prejudice to the injunction already issued, but with liberty to the defendants, after filing their answer to such supplemental bill, to move for a dissolution of the injunction upon five days' notice.

A supplemental bill was accordingly filed, and upon the coming in of the answers, a motion was made to dissolve the injunction, upon the hearing of which motion on the 1st of December 1847, the chancellor passed an order continuing the same until final hearing, or further order.

From this order the defendants, *Albert and wife*, appealed to this court.

The two opinions of the chancellor *(Johnson,)* in this case, one delivered upon the application for leave to file a supplemental bill, and the other upon the motion to dissolve the injunction, will be found reported in the *2nd vol. Maryland Chancery Decisions*, 42.

The cause was argued before Dorsey, C. J., Magruder, Martin and Frick, J.

By Donaldson and Nelson, for the appellants, and
By Alexander and Dulaney, for the appellees.

Magruder J., dissented and delivered the following opinion :

In determining any question which can properly arise upon this appeal, it is certainly not necessary to inquire what would have been the equities of these parties, and in what *forum* these equities must have been adjusted, if *Samuel Jones*, one of the appellants, had not become an applicant for the benefit of our insolvent laws: Although if no such application had been made, or if, notwithstanding such application, such of the insolvent's creditors as had judgments or liens upon his property, were still at liberty to proceed, in our courts, as they might have proceeded, had no such application been made, the law or equity of their case might be very different, yet then, as well as now, we should be met, *in limine*, with the question: Whence the power or jurisdiction of our court of chancery, to interfere, by its injunction, with the decrees of other equity courts, possessing in the premises all its equity jurisdiction?

"The maxim," says chancellor *Sanford*, (1 *Hopkins* 79,) "that every right has its remedy, and that where the law does not give redress, equity will afford relief, however just in theory, is subordinate to positive institutions and cannot be applied, either to subvert established rules of law, or give to the court a jurisdiction hitherto unknown." Again, p. 85: "The maxim which teaches, that a judge should amplify his own jurisdiction, has no place in our institutions. The utility of this court, (chancery,) so important in the general structure of our system, will be best consulted and preserved, by preserving its jurisdic

tion within the limits that are now established." Is the power to grant the injunction, which was granted in this case, within those limits?

There was a time, when the jurisdiction of chancery to give relief, even after a judgment at law, was gravely questioned. It has, however, been long settled, both here and in *England*, that injunctions might be issued for such purpose. But can such relief be had in all cases? Not if there was always in the case, a prompt and adequate remedy at law; nor for a matter of which the defendant might have availed himself at law, 1 *John. Ch. Rep.*, 51. In *Matthews vs. Joer*, 9 *Wheaton*, it was said: "A question decided at law, cannot be reviewed in a court of equity, without the suggestion of some equitable circumstance, of which the party could not avail himself at law. Were a court of equity, in a case of concurrent jurisdiction, to try a cause already tried at law, without the addition of any equitable circumstance,to give jurisdiction, it would act as an appellate court, to affirm or reverse a judgment already rendered, on the same circumstances by a competent tribunal." See also 2 *Hen. & Mumford, p.* 146, and 1 *Johnson's Ch. Rep.*, *p.* 95.

But upon what ground can the chancery court, meddle with a decree and proceedings in a case in the county court, as a court of equity? It must not be said that it possesses this power, because it always had concurrent jurisdiction with the county court, and having first got possession of this case, therefore it has a right to act upon the whole subject? This is not sustained by the record. The bill upon which the assertion is made to rest, *if indeed it was properly before us*, was to prevent *Jones* from conveying to the other defendants therein named, any of his property, thereby giving an undue preference to them: and asking, too, for a receiver. This surely is not the commencement of a suit, which impeaches a decree of another court, and asks the chancellor to take jurisdiction of a trust. But if, in truth, the first bill gave to the chancery court all the jurisdiction which we are told it thereby acquired, is a second injunction the proper remedy for a breach of the first? The complainants ought to have sought relief *in the first suit*.

before the application of the insolvent, it must have all the by applying for an attachment of contempt, and not by a second original bill, which surely is no supplement to the first.

But even if every thing thus far insisted upon be admitted, of what advantage will it be to the appellees? It must be granted, that when two courts have concurrent jurisdiction, the plaintiff ought not at the same time to proceed in both courts, for the same thing. If he should, and the suits be pending in courts of common law, the defendant may plead *in the second suit*, the pendency of the former action, and thereby defeat the second action. In equity, however, it is quite different. If the complainant has two suits pending against the same defendant for the same thing, the court upon application will put him to his election, and oblige him to dismiss, *not his first suit, but the one or the other.*

Equally groundless is the notion, that the complainants here have a right to object, that the defendants are the complainants in the county court. The complainant ought indeed to confine himself to one court, but the defendants, if they have a cause of action, (especially if it be not against the same complainants, as is the case here,) may select any court, whether of law or equity, which has jurisdiction. Here the controversy in the county court, is not with the same persons, or for the same thing; the decree, in either case, would not be evidence in the other; the rights of no stranger to the suit would be prejudiced by such decree, but as this court has often said, such a decree is fraudulent and void, as to all such parties.

But the obvious answer to all that has been said in this case, upon the subject of concurrent jurisdiction, is, that the debtor has elected to ask the relief which our insolvent laws offered to him. Upon this application being made, and the trustees being appointed, the act of 1805, chap. 110, says, *the county court* shall direct the trustee to sell and convey the property conveyed to him, as they, (the county court,) shall think most for the advantage of the creditors, and the produce shall be distributed among the creditors, after satisfying all incumbrances, judgments and liens. For this court's exposition of this law, see the case of *Alexander vs. Ghiselin*, 5 *Gill*, 138.

The appointment of permanent trustees, being made known to the chancellor, by the last bill of the appellees, there could exist no ground for the continuance of this injunction, and no reason for asking a continuance of it, as the complainants in the suit in the county court, could not proceed at law to execute their decree, and the court which passed it, and which, in virtue of the debtor's application, has the exclusive administration of all his assets, could of course hinder any proceedings under a *fi. fa.*

The complainants in their several bills of complaint, assume that the deed of trust, which several of *Jones* creditors obtained from him, may be impeached by others of the creditors. As yet however, none of the creditors whose right it is, have thought proper to impeach this deed. Surely no law gives to the chancellor the power *ex officio*, to declare it either void or valid. In answer to a remark once made to *Lord Redesdale*, (1 *Sch. & Lef.*, 204,) that great injustice had been done to the complainant, he very correctly said: "It is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorise the court to interfere." Who having the right to do it, has asked the chancery court to declare this deed of trust to be fraudulent? A deed, though it be actually fraudulent as to creditors, can never be adjudged to be so, until it is impeached in a proper form, in a proper place, at a proper time, and by proper persons. A court has no more right to assume jurisdiction, than to decline to exercise that which the Constitution and laws give to it.

Whenever this deed of trust is to be impeached, who are to impeach it? Unquestionably, this is among the duties of those whose duty it is to collect, sue for and distribute the funds, answerable for the insolvent's debts. Are they before us? Yes, in three distinct characters; and in all of these characters they pray the court to adjudge this deed to be, (not void, but) valid. Upon such a bill, in the absence of many of those, who are interested in the result, can the court entertain the question, and undertake to decide that the deed is fraudulent or valid? Can these parties give to the court jurisdiction, which the law denies to it? As trustees appointed by the

court, on the application of the insolvent, it seems to be their duty to impeach the deed, if it is to be impeached at all; *but*, as the trustees named in the deed of trust, it is their duty to attempt to uphold it. They have their own reasons, it would appear, for preferring to discharge the latter, and, of course, for violating the former duty; and they turn away from the court, by which they were appointed, to which alone, as trustees of the insolvent, they have to render any account, by which alone they may at any time be removed for misconduct, and pray a court, which can exercise no control over them, in that character, to take jurisdiction, and to counsel them in the execution the trust. Can this be endured?

It must be seen, that I do not regard this case as presenting a mere question of *meum* or *tuum*, in which the parties litigant, alone, have an interest. It may be good or bad policy to give to debtors, in failing circumstances, a right to prefer one creditor to another. This, however, is a question to be decided by the legislature, and the safety and welfare of this community require, that the judiciary be prevented from meddling with it. The Court of Appeals never can be a court deeply read in chancery law? The utility of an appeal from chancery to that tribunal, consists, in a great measure in this, that thereby all the extension of its jurisdiction, under the pretence of carrying out some of those "maxims of equity," which in olden times were adopted by that court, (and which will admit of an interpretation, which will enable it, to render other courts, and even the legislature, useless,) may not be extended. A distinguished chancellor of *New York*, speaking of a power attempted to be given to his court, and not more to be dreaded than this, remarks:—"Should this court take cognizance of these cases, they would form a chapter of jurisdiction far more ample than any one which it now possesses; and the assumption would be a bolder stride of power than was ever made by the *English* chancery in any age." The chancellor once had the power which it is thought he may exercise in this case, but it was deemed wise to take it from that officer, and confide it, we have been told by this court, to others *exclusively*. We must all be content to do as much of the State's work, as it is

made our duty to do, and to do no more. It is denied that the chancellor has any right to decide any of the questions, which, in this case, it seems, were put to him. At a proper time I opposed the doctrine, that the powers of the county court, confided to it by our insolvent laws, are to be exercised, subject to no right of appeal to this court.—(See *ante*, 164.) Such, however, is the law of this court, as far as its own decision can settle it;—and if this court has no appellate jurisdiction in such cases, I cannot admit that it has a right, in this indirect mode, to counsel, or it may be, instruct, the county court, what securities are good and what are void, what constitutes a part of the trust fund; what debts are to be paid by order of the county court.

It is a new idea to me, that in a case in which two courts possess co-ordinate jurisdiction, either has a right to determine, under any circumstances, whether the other can rightfully exercise jurisdiction.

It is possible that the law of this case might be in some respects different, if the trustees appointed by the court, and those named in the deed, had not been the same persons, and other views of the case might be taken, if these two classes of trustees could appear to a suit, the one as complainant, the other as defendants. But this case presents no opportunity for such discussions. They are the same persons; the property conveyed by the deed of trust is answerable, at all events, for some of the debts due by the insolvent. If that court can be ousted of any portion of its exclusive jurisdiction, how can it be said that the legislature of *Maryland* is one of those departments of governments, with whose powers the judiciary cannot meddle? If we look at our insolvent system, we shall find that the county court is to limit the time for creditors to bring in their claims, to direct issues on contested claims, and is vested exclusively, with other powers, without which the trust fund, and amount of indebtedness, cannot be ascertained. Now if the county court possesses all those powers, and the chancery court may, by injunction, restrain that court in the exercise of them, because it is imagined to have obtained jurisdiction over the whole subject by reason of some proceeding instituted in it

powers given to the county court, or it is in the situation in which it sometimes supposes other courts to be, and thereby furnishes itself with a pretext for interfering with other courts. *It cannot afford complete and adequate relief.* The power of the county court, to adjudge the decree to be void or valid, surely cannot be questioned in a court, which decided in the case of *Carter and wife vs. Dennison, ante*, 157, that its decision, be it right or wrong, could not be questioned elsewhere,—its decision, that the mortgaged premises were answerable for a portion and but a portion, of the debt, notwithstanding the transaction was tainted with usury.

The question on which the two courts below seem so widely to have differed, (which had jurisdiction first,) according to my understanding of chancery law, is one of very little importance. That court never dismisses a bill because of the pendency at the same time of another bill between the same or different parties. If there be found two suits, both of which ought not to be pending at the same time, it may be said of that court, (it is otherwise in a court of common law,) that it never inquires which was first instituted. Most of the cases with which the books furnishes us, relate to cases, both of them pending in the same court; yet the defendant can never insist, that the one which was brought the last should be dismissed, The court of chancery never can put the complainant to his election, and insist that he dismiss a suit elsewhere, unless if the two suits were pending in that court, it could pass an order, that he elect which of the two suits he will dismiss. It can only enforce the order, by dismissing the suit in its own court, if the complainants refuses or omits to dismiss the suit pending elsewhere.

Much that has been said in this case might have been left unsaid, if it had not been taken for granted, that the mode of proceeding in equity was the same as that at common law. The fact is, that chancery is constantly acting in direct opposition to this, supposed to be, one of its established rules of practice. In the case of a creditor's bill, as soon as a decree has been made directing an account, all the creditors—those who had suits pending *before* the bill was filed, and those who instituted them *after* the filing of the bill—may be restrained from

proceeding at law. 1 *Story*, *sect.* 549. So when a party to a suit at law, asks for a discovery to enable him to try the action at law, chancery will not only enable him to obtain the discovery, but will frequently go on to give him relief, and thus oust the court of law of its jurisdiction. 1 *Story*, *sect.* 64. As yet there is no law known in chancery like that which it is contended required the appellants, or any of them, to file in chancery the bill which the record tells us was filed in the county court.

I can discover no ground for a continuance of this injunction. I certainly can discover no propriety in any case, of deciding any question which is not properly before the court.

With respect to very much that has been said in the course of this discussion, my answer to it is, "I am not called upon to say, that this is not a proper subject for the interposition of the legislature. The argument that justice requires some new remedy in these cases, is an argument addressed to the legislature, and not to the courts of either law or equity."

FRICK, J., delivered the opinion of this court.

On the 14th day of September 1846, *Johns Hopkins* and others, creditors of *Samuel Jones*, filed in the court of chancery their bill of complaint, against *Jones*, *William J. Albert and wife*, and one *Michael S. Norman*, in which it is alleged, that *Jones* being hopelessly insolvent, and knowing himself to be so, and having no reasonable expectation of being exempt from liability or execution on account of his debts, without applying for the benefit of the insolvent laws, and being in fact under expectation of applying for the benefit of said laws, and designing and threatening to prefer certain of his creditors, his near relations, was about to convey and transfer a large portion of his property and effects to his brother-in-law and sister, *Albert and wife*, with intent thereby to give to them an undue and improper preference over the rest of his creditors. That the complainants being about to institute suit against *Jones*, to compel him to apply for the benefit of the insolvent laws, he had changed his residence, that he might the longer delay his creditors, and better secure to his favorite creditors the prefer

ences which he contemplated. The bill, therefore, prays for an injunction to restrain *Jones* "from conveying, assigning or transferring any of his property or effects, rights or credits, to the said *Albert and wife*, to secure or pay the debt due to them in preference to the rest of his creditors; and to restrain the said *Albert and wife* from receiving any such preference." The injunction was accordingly granted, and still continues in force.

*Jones* had previously carried on business in the city of *Baltimore*, under the name of *Talbot Jones and Company;* and on the 5th of September 1846, he suspended payment. Among the debts due by him, was a large sum of money belonging to his sister, (who afterwards intermarried with *Albert*,) which he held in a fiduciary character, as trustee for herself and her children, and which he had appropriated and misapplied to his own use. In the month of November 1845, *Albert* had applied to him to reinstate this sum, or to give security to that intent, when *Jones* agreed to convey to *Albert and wife*, a certain property in the city of *Baltimore*, called the "*Wheatfield Inn*," and other property of the said *Jones*, with a view to such security of the moneys so misapplied by him. But this agreement was never executed.

On the 26th of September 1846, after the service of the injunction, *Jones* convened his creditors, explained to them his condition, and offered and agreed to convey all his property to trustees for their benefit, upon the condition and consideration of a release, to be executed by them, of all claims against him. But at this meeting, *Albert*, who attended, refused to concur, insisting, that the trust debt due to himself and wife, ought to be first secured and preferred over the claims of the other creditors. The proposed arrangement therefore failed, and no deed was executed at that time.

On the 29th of September, *Albert and wife* thereupon filed their bill on the equity side of *Baltimore* county court, pending the injunction granted on the preceding bill, alleging the violation of the trust on the part of *Jones*, and his promise to protect the interests of his sister, by a conveyance of the "*Wheatfield Inn*," and his failure so to do, and praying that he may be

decreed to pay to them the sum of money thus due to them under the trust, and misapplied by him to his own purposes.

On the 1st day of October, the return day of the subpœna, which was regularly served, *Jones* appeared by counsel; and on the 30th of October, having filed his answer, admitting the appropriation of the money, and his promise to reinstate the fund by the security proposed, a decree was passed on the day following, (31st October 1846,) directing *Jones* to bring into court the amount ascertained and admitted to be due to the complainants.

Previous to this decree, on the 22nd of October 1846, *Albert and wife* had filed a second bill on the equity side of the same court, of the same import as the first, alleging, moreover, the intention of *Jones* to make a conveyance of his property for the benefit of his creditors, and praying an injunction to prevent him from conveying for this purpose the "*Wheatfield Inn*," which injunction was accordingly granted.

On the 26th of October 1846, *Jones* executed a conveyance of all his property, (with the reservation of the "*Wheatfield Inn*," which was excepted from said conveyance,) to *Ross* and *Winn*, in trust:—

1. To defray the expenses attending the execution of the trust.

2. To the payment of the several creditors named in the schedule annexed to the deed.

3. To the payment of the claims of such of his creditors, as shall, on or before a given day, (the 1st day of January next,) execute and deliver to the trustees, full and absolute releases and acquittances of such claims. And

4. If any surplus shall remain, after satisfying the aforesaid creditors, to apply the same to the satisfaction of the claims of all other creditors of said *Jones*, without any distinction or priority.

In the same conveyance he also covenanted to convey to the said *Winn* and *Ross* the "*Wheatfield Inn*," whenever the injunction, before alluded to, should be dissolved, or as soon as he can legally do so, to be held upon the same trusts as the other property conveyed to them.

On the 11th of January 1847, *Jones* made his application for the benefit of the insolvent laws, and *William Winn* and *James Ross*, the trustees under the conveyance, before referred to, were afterwards duly and regularly appointed his permanent trustees.

On the 13th of January 1847, *Winn* and the parties complainants in the original suit of *Hopkins and others*, filed their bill in the court of chancery, stating the import and object of the original suit, and the injunction thereon; and the subsequent proceedings of *Jones*, and of *Albert and wife*. The object of this bill is, to impeach and set aside the decree obtained by *Albert and wife against Jones*, as fraudulent and void against the complainants, and to stay execution of that decree against any property of *Jones*. The injunction prayed for was granted, and is still in force.

*Jones*, in his answer, denies that the bill filed on the equity side of *Baltimore* county court, was through any combination or confederation with him on the part of *Albert and wife*. And their answer makes the same denial, and sets forth particularly the same facts in defence, which they had before averred in their bill of complaint in *Baltimore* county court.

We shall first in order dispose of the assignment from *Samuel Jones, Jr.*, to *Winn* and *Ross*, as trustees under that conveyance for the creditors of *Jones*.

Having brought our minds to a satisfactory conclusion against the validity of the conveyance from *Samuel Jones, Jr.*, to these complainants, in this cause, we might be content with a reference to the opinion and reasoning of this court, heretofore, in the case of *McCall vs. Hinckley*, 4 *Gill*, 128, as full to the purpose, and claiming our unqualified assent. But as the assent thus given is not only to affect the decision of the case now under consideration, but to determine the law upon that class and character of assignments involved in the present controversy, we are not entirely free to pass a silent judgment upon the question, without a few words in vindication of the opinion and conclusions thus formed.

It is to be regretted that there has been so little uniformity of opinion on a subject of such constant occurrence, and so much

general interest. From their first introduction into commercial practice, these assignments have always encountered difficulties and opposition, and have only finally obtained countenance, in the courts, upon the *assumed* weight of professional opinion in their favor. Still, it may be safely said, that whatever sanction has been given to them, by this alleged preponderating opinion of the profession, the question is still to be considered floating and unsettled; and wherever this influence has been permitted to prevail, it was with a distrust, which, looking to the tone of more recent decisions, is every day increasing. In many of the States, (it may be said in a majority of them,) they have been rejected by the courts, as fit instruments for the perpetration of fraud. In others, where the judges have yielded to the force of professional opinion against their own judgment and conviction, the legislatures, conforming to the general and healthy sentiment of the community, have denounced and exploded them; and wherever sanctioned, as it is not denied they have been, by the highest judicial names of the country, it has been with a constant expression of reluctance and regret that from deference to authority and precedent, they were not at liberty to decide otherwise.

That these considerations, however, do not disembarrass the question, is shewn by the continued conflict of opinion, which has prevailed from the earliest decisions on the subject, up to the recent action of this court in the case of *McCall and Hinckley*, 4 *Gill*, 128, which resulted in a divided opinion of the court. If, then, the alleged preponderance of professional opinion in this State be invoked in their favor, yet it is something that the question is not concluded here, but still open to review, and may now be settled upon principle, by the action of this court, free to dispose of it, upon what may be considered its own intrinsic merits.

It is not pretended that at common law, a debtor in failing circumstances, may not prefer any creditor he may please to select. "Apart from the provisions of the insolvent laws, he may secure one creditor to the exclusion of others," 5 *G. & J.*, 377. Nor is there any objection to the validity of a transfer by the debtor, of his whole estate for the equal benefit of all

his creditors, 6 *G. & J.*, 205. And it is properly assumed, that wherever a party is unable to pay his debts, he becomes morally a trustee for all his creditors. In such a predicament each is entitled, without conditions, to such a ratable share of the property and estate of the debtor as it will yield; and an assignment to that effect is therefore good. On this assumption of equality among the creditors, the bankrupt and insolvent laws of every commercial community proceed, at the proper time, to divest the debtor of his property, and give the distribution into the hands of the law. Where the debtor is involved beyond his means, in equity and justice, his property belongs to his creditors; and such an assignment in favor of all his creditors *equally*, is but acting in conformity with the general policy of the law. Yet this same policy, which encourages an equal distribution among the creditors, has, by legislative enactments, continually warred against these individual preferences at common law; and, under the insolvent system of our own State, has maintained a struggle against them for almost half a century.

But the question is not in relation to this preference of particular and favored creditors, admitted to be good at common law, or upon an assignment, conveying *equally to all creditors without condition*. But whether an assignment of all the property of a debtor, for the benefit of all his creditors equally, *upon condition*, that each shall execute a previous release of his whole debt, or be postponed until all other creditors, signing a release, shall be satisfied in full, is to be treated as valid. In other words, it is said, that a debtor in failing circumstances, unable to pay all his debts, may say to his creditors, that they shall have none of his estate, unless they will release the whole of their claim for a portion; and if they decline to surrender the whole for a part, they shall be deferred to the precarious balance, which the assenting creditors may leave for the satisfaction of the claims of the recusant creditors.

Let us now examine how far judicial and professional opinion, in favor of this doctrine, may be said to preponderate, and what the reasoning that is relied on in support of it. In the case of *Halsey vs. Whitney*, 4 *Mason*, 206, so constantly re-

ferred to, because it is the judgment of that distinguished jurist, *Justice Story*, on the subject, he says: "In one sense the discussion may be said to depend upon local law; in another, so far as it involves principles and presumptions of constructive fraud, it belongs to the common law, and must turn upon the same considerations as would govern in *New York*, *Pennsylvania*, or *England*." And he adds: "General assignments for the benefit of all creditors, free from the operation of the bankrupt laws, are rather encouraged than discountenanced by the common law."

So far as a general proposition, it is unquestioned, and fully sustained by the authorities both here and in *England*. But do the cases in the *English* courts proceed beyond this general proposition? The case of *Pickstock vs. Lyster*, 3 *Maule & S.*, 371, is an assignment precisely of this character, free from all reservation and condition, and may well be pronounced by the judges, "an act of duty rather than of fraud." So, also, the cases of *Holbird and Anderson*, 5 *Term R.*, 235. *Estwick vs. Calleau*, 5 *Term*, 420. *Meed vs. Howell*, 4 *East.*, 1, are to the same purport; inflict no conditions on the creditor, and reserve no benefit to the debtor.

It is not singular that these cases should have challenged the approbation of the *English* courts, and of *Judge Story*, as being "so far from fraudulent," they were rather the honest acts of the parties. In the case in 5 *Term R.*, 235, *Lord Kenyon* said "there was no fraud. The plaintiff was preferred by his debtor, *not with a view to any benefit to the latter*, but merely to secure the payment of a just debt." Here is, at once, an obvious distinction, and a clear principle, elicited from these cases; and it is at least questionable, whether the case of "*The King*, (in aid of *Braddock*,) *vs. Watson*," 3 *Price*, 6, so much relied on, can be said to controvert it. It has been justly pronounced a bald case, in 11 *Wendall*. The assignment under consideration is no where set out. The terms set forth in the defendants' plea do not purport to exclude any creditor, and would seem to contemplate that each (creditor) should receive only his proportion of the whole fund:—"In trust for the benefit of *all his creditors*, and that they should take the same in

discharge of the respective debts due and owing to them, and release the said *Wheeler* therefrom." It seems to be rather a deed of composition, that contemplated a release from *all* the creditors. There is certainly no *express* preference to any who sign, or an exclusion of such as do not. All are placed upon an equal footing; not under any menace or condition that the portion which one might refuse, shall go to swell the dividend of the others. It gives, by its terms, to none more than his dividend. And this appears, also, to be sustained by the remark of the court: "There is no fraud," they say, "in this case, affecting the assignment, which has been made for equal benefit of all the creditors, *Braddock*, as well as the rest. But even if this were a misconstruction of the case, it is at least justified by the report of it, which, as before observed, is extremely "bald;" and presents but a feeble foundation on which to build a great and overruling principle in the law. It is, at all events, the only case in the *English* books, from which the doctrine can derive any support. And when it is considered, that the other cases referred to expressly discountenance such assignments, as are made with a "view to any benefit to the grantor," it ought not to be allowed that preponderance in the *English* decisions on the subject that is claimed for it here. The authorities there, as seen, do repudiate assignments, even of all the property of the debtor to his creditors, that reserve *any ulterior benefit to himself*. And tried by this test, it is doubtful whether the question in the immediate form now before this court, has ever been distinctly or substantially decided in *England*, in favor of such a stipulation. This, however, is assumed in the case of *Halsey vs. Whitney*.

In approaching the *New York* cases in the progress of *Judge Story's* opinion, it is admitted, that the reasoning of the court in *Hyslop vs. Clarke*, 14 *Johns. R.*, 459, and in *Austin vs. Bell*, 20 *Johns. R.*, 442, is, as far as it goes, strong against these stipulations in favor of the debtor. (4 *Mason*, 228.) Yet in the decision of *Halsey and Whitney*, these authorities are rejected, because "they do not turn upon the naked point of a release, but upon that, as incorporated into a peculiar trust," (p. 230,) and the weight of authority is consequently affirmed

to be in favor of this stipulation. To this weight of authority, the decision in *Halsey and Whitney* is made to yield, not without the pregnant declaration, however: "If the question were entirely new, the strong inclination of my mind would be against the validity of them."

In the case of *Lippencott vs. Barker*, 2 *Binney*, 174, the point was presented. And it was there affirmed by two of the judges, that the stipulation for a release was not fraudulent, against the opinion of *Judge Breckenridge*, who pronounced it immoral in the debtor to "couple an interest for himself, in exacting a discharge from that portion of the debt which may remain unpaid." The *C. J. Tilghman*, (with *J. Yeates*,) rested the decision upon the particular circumstances of the case before them. The objections urged, that the debtor had no right to insist on so unreasonable a condition, and that it is ill policy to suffer any kind of conveyance that stifles all enquiry, he observed, *had great weight as general principles.* But the question was, how far they were applicable to the present case? to the *circumstances of which*, he begged to be understood, his opinion was confined.

It is conceded, that the validity of these stipulations has been sustained in *Pennsylvania.* In the case of *Brashears vs. West*, 7 *Peters*, 608, it was *reluctantly* sanctioned as the received doctrine of her courts. But the *Supreme Court of the United States* through *C. J. Marshal*, expressed themselves far from satisfied, that such a deed, excluding from the benefit of its provisions, all who should within a given time refuse to release, ought to be sustained: "If the release were voluntary," he says, "it would be unexceptionable. But it is induced by the necessity arising from the certainty of being postponed to all those creditors, who shall accept the terms, by giving the release. It is not therefore voluntary"—(P. 615.)

This opinion of the *Supreme Court* was expressed long after the decision in *Halsey vs. Whitney;* and indicates distinctly, what the decision of that court would be upon principle, untrammelled by the local decisions of the States. It is therefore, now, a part of that judicial sanction which may be set up, against the preponderance in favor of the validity of these

stipulations; and whatever the weight of judicial opinion before, it has contributed materially, with the more recent decisions in some of the States, to incline the balance of authority the other way.

To these decisions in *New York* and *Pennsylvania*, and to the *English* authorities, the investigation in this case, of *Halsey vs. Whitney*, has been limited; and even, within those bounds, I am not able to persuade myself, that the sanction they give to that opinion, is so decidedly preponderant, as to control the question, which in *Maryland*, at least, is still open upon principle and authority.

If the *English* cases there cited, do not turn upon this naked point of a release, (and that they do not is manifest from a close review of them,) then it cannot be said, as was urged in argument, from high authority in this State, that the "doctrine is sustained by the uniform current of *English* decisions." And if the doctrine which is affirmed in *Pennsylvania*, is denied in *New York*, then nothing is so far gained in its favor, on the score of preponderance. As regards the latter State, no doubt now remains of the decision of her courts directly upon the point. The case of *Grover vs. Wakeman*, 11 *Wend.*, 187, affirms, that such an assignment to be valid, "must be absolute and unconditional; must contain no reservation or condition for the benefit of the debtor; nor extort from the fears or apprehensions of the creditor, an absolute discharge for a partial dividend." This is characterized by *Chancellor Kent*, as the most "stern decision that exists any where on the subject." And yet, what principle or doctrine of wider latitude can be tolerated, consistent with the sanctity of contracts between debtor and creditor? It is manifest from the reasoning in 4 *Mason* 228, that *Judge Story* himself, freed from authority, would have yielded his entire assent to the doctrine, upon principle. He says: "Where a debtor stipulates for a release, he surrenders nothing but upon his own terms. He attempts to coerce his creditors, by withholding from them all his property, unless they are willing to take what he is willing to give, or is able to give, in discharge of their debts. It is not sufficient to say, that it is a proposition

to creditors; so would be the condition by the debtor to receive a gross sum. Has it not a tendency to obstruct the common right of the creditors? Is not its design, to prevent creditors from receiving compensation, out of the debtor's property, without yielding up some portion of their debts, and conferring on him a substantial benefit which he has no right to demand."

He yielded, however, to what he conceived the preponderance of authority, to the contrary. Not to the decisions of *Massachusetts;* for there the cases were pronounced *in equilibrio.* His decision, therefore, was not upon the local law of that State, but upon what "seemed the weight of authority in favor of them elsewhere." Certainly the point had not been then judicially settled in *Massachusetts.* For in the case of *Borden vs. Sumner*, 4 *Pick.*, 265, under consideration, about the same time, before *C. J. Parker*, the question, (although not embraced in the case,) was declared to be still an open question. His language is: "The point has never been decided in the State of *Massachusetts*, and the court reserve themselves until it is directly presented" Nor does it appear, even now, definitively settled there, at least up to the year 1837, from the case of *Nostrand vs. Atwood*, in the supreme judicial court of that State, 19 *Pick.*, 281, where the question was fully argued; but *Dewey, Justice,* observed: "Upon the point many authorities were cited, which shew that this question has been one elsewhere much litigated, and the result has been a conflict of opinion in the courts of the different States in reference to it. In the view we have taken of the present case, it is wholly unnecessary to consider, particularly, the various adjudications, or pronounce any opinion upon the abstract question, of the effect of the introduction into an assignment of a stipulation for a release by the creditors who become parties to it, in a case where such stipulation might be prejudicial to a creditor indisposed to assent thereto; and who might thus be deprived of receiving his share of the fruits of the assignment."—(P. 284.)

Thus far, then, the preponderance which is claimed in their favor, does not prevail. And in other States of the Union, where the question has been presented, the decisions are still so

much at variance, and in conflict with each other, that the fair limits of a judicial opinion, forbid a more critical examination here. It is not hazarding much, however, to say that the prevailing tone of these decisions, is now more against, than in favor of the validity of these stipulations.

For authorities against these stipulations see in NEW YORK:—4 *Paige*, 24. 11 *Wendall, Grover vs. Wakeman.* 6 *Hill*, 438, *Goodrich vs. Downs.* 1 *Denio*, 197, *Hastings vs. Belknap.* In OHIO:—5 *Ohio Rep.*, 893, *Atkinson vs. Jordan. Wright R.*, 606, *Wooley vs. Urner. Same*, 701, *Bandall vs. Reed.* In NORTH CAROLINA:—1 *Iredel's Law Rep.*, 490, *Heffner vs. Irvin.* In MISSISSIPPI:—1 *Smedes and Marshall*, 208, 265, *Robinson vs. Emory.* In MISSOURI:—6 *Missouri Reports*, 302, *Brown vs. Knox. Same*, 317, 319, *Drake vs. Rogers.* In ALABAMA:—6 *Alab. Rep.*, 179, *Wiswall vs. Ticknor.* 4 *Alab. Rep.*, 322, 374, *Gazzan vs. Pointz.* In CONNECTICUT:—6 *Vol. Conn. Rep.*, 282, *Ingraham vs. Wheeler.* In ILLINOIS:—3 *Scammon*, 417, *Howell vs. Edgar.*

In favor of the validity of such stipulations, see for PENNSYLVANIA:—2 *Binney*, 174. 10 *Sargt. & Rawle*, 439. 5 *Rawle*, 221. 6 *Watts & Sergt.*, 301. 8 *Watts & Sergt.*, 304. 10 *Watts*, 257. For VIRGINIA:—See 8 *Leigh*, 291, *Howell vs. Edgar.* For SOUTH CAROLINA:—1 *Richad'n Equity*, 217. For MASSACHUSETTS:—4 *Mason*, 206, *Halsey, vs. Whitney.* But see, also, 5 *Pickering*, 28, and 19 *Pickering*, 281, heretofore referred to. For NEW HAMPSHIRE:—5 *N. Hamp.*, 113. But see, also, 10 *N. Hamp.*, 108. For MAINE:—See 5 *Greenleaf*, 245. But, also, 23 *Maine*, 261, and *Ware's Rep.*, 241, 244. See, also, the 1 *Vol. Amer. Leading Cases*, 84, inclined against them.

The cases in the *Supreme Court of the U. S.*, are but in conformity to State decisions, and, therefore, only shew what the doctrine in such States is. And in the States of *Pennsylvania*, *New Hampshire* and *Maine*, statutes have been passed, declaring such deeds void.

For cases of equivocal import, see further, 2 *Pick.*, 129, 137.

3 *Penrose & Watts*, 83, 94. 3 *Wharton*, 347, 355. 4 *Mason*, 137. 1 *Iredell's Eq.*, 120, 124. 8 *Maine*, 234. 16 *Number Am. Jurist*, 284, *Case of the Brig Watchman.*

An examination, (even cursory,) of these authorities, will shew, that the doctrine, where it prevails, has grown up more by the assent and assumed acquiescence of the profession, than by original authoritative precedent in its favor. And in the case of the *Brig Watchman*, *Ware*, 232, *(16th No. Am. Jurist*, 285,*) Judge Ware* intimates the salutary caution to the profession and the public, "not to trust too implicitly to a practice, which, to whatever extent it may have insinuated itself into the usages of commerce, was yet to be subjected to the severe and rigorous scrutiny of the law."

To that scrutiny the case at bar is now submitted. For in this State the subject is *res non adjudicata.* I am not unmindful, that assignments like the one before us, have had the sanction of high judicial names among us, yielding to the authority of the decisions and the opinions we have had under review. Those decisions and opinions, however, are neither so general or so uniform as to preclude an examination upon the merits, and upon principle, in this State, where the question is still open. And following the lights of my own mind, I have not found them so overruling, as to bear down the force of those principles and convictions, upon which I feel myself bound to denounce them.

The validity of these assignments must be maintained upon the reasoning, that there is no coercion contemplated upon the creditor. For if it is intended to compel or coerce the creditor into the terms of the debtor, such an assignment, it seems, may be treated as a fraud.

"The question (says *Judge Story*,) is, whether the intent apparent on the deed, be not to coerce the creditors to a settlement."—*Halsey vs. Whitney*, 4 *Mason*, 229.

"One object of the deed evidently was to coerce the creditors to acquiesce in the terms offered to them."—*Van Ness, (Justice,)* 14 *Johns. R.*, 443, *Hyslop vs. Clarke.*

"An attempt to lock up his property from his creditors, so that they cannot reach it, but on such terms as he chooses to pre-

scribe, would be such a manifest effort to defraud them, that two opinions cannot be entertained on the subject."—*Judge Ware*, 8 *Maine*, 234.

In all these cases the stress of language, and the inquiry, is upon the point of coercion. The variation in the terms of the assignment cannot affect the principle, when the intent is manifestly to defeat the creditor in his resort to the property of the debtor, unless he will release the debt. It is not the question here, whether the assignment is void under the statute of *Elizabeth*, 13, *ch.* 5? Conceding it not to be obnoxious to the provisions of the statute, is it not such a disposition of the debtor's property, as is open to the imputation of fraud, upon those to whom it is addressed, and intended to affect? Does it not place the property beyond the reach of the creditor, and deprive him of the most effectual means to enforce his debt? What is it, then, but an address to his fears? Has he any remedy left him, but the fruitless resort against the person of his debtor? The condition of the assignment requires him to abandon his legal remedies, or forfeit his just proportion of the debtor's property; to relinquish the whole of his claim for the portion then available, and all reservation or resort to the future acquisitions of his creditors. "To execute full and absolute releases and acquittances," is the language of this instrument. *All* the property of the debtor is conveyed in general terms, subject to pre-existing liens and priorities to certain preferred creditors. When all is thus withdrawn from the legal action of the creditor upon it, and as his last alternative, he accepts a part, for the whole of his debt, is it the assent of his will, or the assent of his fears that directs him? Can the creditor, in such a position, be considered as acting out his own will, in relation to the debt at risk? He sees at once, his whole relation to the debtor changed by the alternative presented to him; and if he hesitates to accept, the prospect before him is delay, expense, and litigation; and the result in most cases, hopeless and barren. For even the residue of the fund that may remain, after satisfying the assenting creditors, is beyond his reach, except such proportion as the debtor has chosen to reserve to him, from the surplus, if any; and thus the non-assenting creditor is essentially defeated of his remedy, even against such surplus.

But this it is said, is but another mode of preferring creditors, who, by executing the release, become favored over those that refuse; and the debtor it is conceded, may prefer any creditor he pleases. In other words, that the creditors who release, are placed upon the footing of preferred creditors. This by no means follows. It does not necessarily result, that because a debtor may grant a preference *absolutely*, that he may also do so *conditionally*. The distinction is obvious. In the one case he proposes to pay one or more creditors, still leaving his liability and the balance of his property unaffected as regards the others; while in the other case, he designs to influence or coerce all into the terms stipulated, or remove his property out of their reach. He holds out to the creditor this contingent preference, to become absolute only by an act of the creditor, beneficial to the debtor himself, by a release of the debt. Such a power would enable the debtor, at any time, to lock up his property against his creditors, until they accept the terms he chooses to dictate.

It is besides worthy of remark, that this is proposed to be done by an instrument, larger in its scope than the law; that exacts a release more comprehensive, and a disposition of his property less equable, than the law contemplates upon the surrender of a failing debtor, with reference to all which the creditor is supposed to contract. The law exempts the future earnings of the debtor from any further claim on the part of the creditor after a discharge. Yet every acquisition by gift, descent, devise, &c., is still liable, in discharge of his debts. The condition of the release here stipulated for, requires an unqualified surrender of all claim, and is not to be defended upon the ground, that it is a mere legal possibility which the law reserves. For, to this it is a sufficient answer, that such an assignment is, at least, against the policy of our law, which gives the benefit of this possibility to the creditors.

The assignment is conceded to be void, if there be any reservation in it for the benefit of the debtor. In this view of the case, is there not a constructive benefit reserved to the grantor? Besides the benefit of a discharge of the whole debt for a part,

is it nothing to reserve for himself all future acquisitions by gift, descent, devise, &c., of which the possibility is not always remote? A debtor in insolvent circumstances, may still have large expectations from the devise or bequest of friends, and still larger, perhaps, in the course of descent or distribution. If he applies for relief under the insolvent laws, the advantage of all this belongs to his creditors. The testator or donor would, under such circumstances, naturally withhold or withdraw his intended bounty. At all events, the application for the relief by the debtor must defeat these ulterior expectations, and he resorts to a voluntary assignment of this character, by which, (if sustained in law,) he secures the acquisition, otherwise lost to him. And thus both modes of discharge from debts are legalized under one system. Can it be questioned to which the debtor will resort? If no such motive of benefit to himself be in the view of the debtor, thus assigning on condition of release, why not claim the protection of the law, which gives him, (with this reservation,) a full discharge, and secures to his creditors an equal distribution of his property, in obedience to the spirit and policy of the law?

Under the present humane system of policy, in its action upon debtors in failing circumstances, every restraint, calculated to deter him from acting on the fears and apprehensions of his creditors, ought to be sustained. It is sound policy in commercial affairs, and the best security for fair dealing, that the creditor should be assured, that it is not with the debtor an option, at any time, to compel him to accept a portion of his debt, or incur the contingency of losing the whole. To sustain such assignments is to enable the debtor to prescribe his own law, against the known policy of the State; to require of the creditor, acting upon his fears, what the law cannot compel him to do. The debtor dictates the terms of settlement. If the creditor refuses, his safest security for his debt, the property of his debtor, is transferred beyond his reach. Unlike deeds of composition, to which none are compelled, and the assent of all is necessary, and without the assent of all, nothing passes; *here* the terms are absolute and irrevocable upon the execution of the deed, and the creditor must take them as they stand, or

refuse at the risk of losing his debt. It is but seldom, after the execution of such a deed, that *spes recuperandi* ever revives to the unfortunate creditor, who refuses to become a party to its conditions. It is the will of the debtor, which is law to the creditor. And if such disposition of property is valid, what has the creditor left, but to assent upon compulsion. It is mockery to say, under such conditions, that it is optional or voluntary.

Further, to legalize this mode of proceeding, holds out to a debtor an easy and tempting mode to cancel his debts, without further scrutiny or inquiry, such as the law contemplates under a system purposely devised for the discharge of honest debtors. After all the property has passed under a voluntary assignment, the creditor has but small inducement to pursue his claim, with any other prospect than to force his debtor to a legal insolvency, and incur the cost and labor of the proceeding. It ought, therefore, to be considered neither a harsh or severe decision, that repudiates these assignments. Looking to the facilities under our laws of obtaining a discharge, and the justice of those principles, which seek to place all the creditors upon equal terms, it is a just, and not a stern rule, that takes from the debtor in failing circumstances, the right of a voluntary conveyance to his creditors, upon terms dictated by himself. It is a sound standard of right and morality, upon which a court may safely base its decision. It closes the door upon a practice which, if encouraged, becomes the parent of fraud and litigation. Instruments of voluntary settlements like these, may be used for the execution of any nefarious purpose, if left to the discretion of the creditor. They are contrary to the sound principles and policy of the law; and if so, neither general opinion or common consent ought to make them valid. Where they have been sustained, it has been against the sound conviction and judgment of the courts, and with a constant expression of regret, that a doctrine at variance with equity and with morals, must be maintained upon the prevailing understanding of the profession and the public. In deference to this opinion, some among the purest and loftiest legal minds of the country have yielded their own convictions, and given to them the weight of legal authority. They yielded to what at that time was deemed

the preponderance of opinion; but the judgment, and the convictions of these great ornaments and lights of the profession, may still be challenged to our support, in the decision which is here pronounced against the validity of this assignment.

With respect to the creditors of the first class, named and preferred in the assignment, it is unnecessary to inquire, how far their position and rights under the deed may be distinguished from those of other creditors under its provisions. In the opinion of this court, as before expressed, a deed, which does not fairly devote the property of the debtor in desperate circumstances, to the payment of his creditors, but prescribes to them the terms upon which they shall receive part payment, is, in law, fraudulent and void. It is void at common law, *and void as against the statute of* 13 *Eliz., ch.* 5, being made with intent to delay, hinder, and defraud creditors, of their just and legal actions. And when thus void as to part, it is void altogether. The taint, as to part, affects its entirety. The cases of *Grover vs. Wakeman*, 11 *Wendell*, 187, and *Hyslop vs. Clarke*, 14 *Johns.*, 458, before referred to, are cases in point, and parallel with the case before us. They determine, that where a conveyance is good in part, and also bad in part, as against the provisions of a statute, it is void *in toto*, and no interest passes to the grantees under the part which is good. In the former case it is said, that the assignment being void in part, as against creditors and the provisions of the statute, it is void *in toto, although there be no fraud intended.* And to this feature of the case it is, that *Chancellor Kent* directs the remark, that "it appears to be the most stern decision that exists on the subject." 2 *Kent Comm.*, 536, *(note.)* But the decision is far from standing alone and unsupported. *Judge Story* affirms it in *Halsey and Whitney*, 4 *Mason*, 230, and says: "The doctrine in *Hyslop & Clarke*, above, and *Harris vs. Sumner*, 2 *Pick.*, 129, on this point, is sound and wholesome." In 6 *Hill*, 438, *Goodrich vs. Downs:* "If any part of an assignment be contrary to the statute for the protection of creditors against fraudulent transfers, the whole is void." In 9 *Alabama*, 305, *Tickner and Day, vs. Wiswall:* "A conveyance, fraudulent as to part, is void as to the whole of the property conveyed, so far as credi-

tors are concerned." In 6 *Conn.*, 277, *Ingraham vs. Wheeler*, the parallel is true to the case now under review, where the residue, after preferred creditors, was to be paid to creditors, who should release and discharge the debtor, and the court determined the conveyance to be void *in toto*, under the statute of frauds. So also in *Mackie vs. Cairns*, 5 *Cowan*, 547: "A deed or judgment void in part, as being a fraud on creditors, is void *in toto*." And to the same purport are other cases. *Brown vs. Knox*, 6 *Missouri*, 302. *(Mackie and Cairns,)* in *Hopkins' Ch. R.*, 373. *McCluig and Lecky*, 3 *Penrose and Watts*, 83. *Irvine vs. Keene*, 3 *Wharton R.*, 347. And the case of *Macdonald and Strike*, 2 *H. & G.*, 191, may also be cited to shew, that where a deed is annulled as fraudulent, "it is void *ab initio*, and cannot stand in legal fitness for any purpose." We may also here, in passing, add the remark, that the States of *New Hampshire*, *Massachusetts* and *Pennsylvania*, have enacted especial statutes declaring such assignments void.

It remains now to inquire into the propriety and effect of the decree obtained by *Albert and wife*, on the equity side of *Baltimore* county court, pending the injunction and proceedings in the court of chancery. The answers, both of *Jones* and of *Albert and wife*, upon the proceedings now before the court, deny all fraud and combination between them, to evade the injunction upon the original bill, and to procure a preference by this proceeding in *Baltimore* county court, on the part of *Albert and wife*. They claim to have pursued a legal right which the chancellor's injunction did not restrain; and that they have obtained only what the law awards them, in the race of diligence with other creditors. But they shew that they had knowledge, before filing their bill, that *Jones* had failed in business. In fact, the filing of the original bill was notice to them of the doubtful position of *Jones*, and put them in possession of every fact as alleged in it. The bill was filed in the court of chancery on the 14th of September 1846, stating that the debts of *Jones* were far beyond his means of payment, and that he could entertain no hopes of extricating himself, but by an application for the benefit of the insolvent laws; that he

designed to secure certain of his relations, among others, *Albert and wife*, by giving to them an undue preference over other creditors; and prayed for the appointment of a receiver, and an injunction to restrain *Jones* from giving, and the other parties from receiving, any transfer or assignment in preference to the other creditors. This injunction was granted, and still remains in full force. If *Albert and wife*, therefore, can maintain the priority and lien which they have acquired upon the property of *Jones*, by reason of their decree in *Baltimore* county court, it must be because they have obtained it in fair and due course of law, without any violence to the injunction and original proceedings pending in the court of chancery.

Let it be borne in mind, that the injunction from chancery had interposed all the powers of that court, between the parties, and any avowed or contemplated intention of *Jones* to secure them, or any other of his creditors. The original bill of *Hopkins* and other creditors, had drawn to the chancery court all jurisdiction over the estate of *Jones*. He was averred to be hopelessly insolvent, and the bill looked to the appointment of a receiver, until, under the impending application for the benefit of the insolvent laws, it should pass into the hands of trustees. Until this proceeding before the chancellor was properly disposed of, and while the injunction under it remained in force, the parties were restrained, *in any form*, from seeking the preference which it prohibited. This jurisdiction had attached before the proceedings in *Baltimore* county court *on the same subject matter* were instituted. And the bill filed by *Albert and wife*, in that court, as the basis of their complaint, expressly avers, that *Jones* "promised and pledged himself to secure and protect" their debt. On this point, the averments in both bills are identical; and it is but just to the counsel who advised the proceedings, and filed the bill in *Baltimore* county court, to assume, *from this fact*, all absence of design to counteract the proceeding in the high court of chancery. He doubtless supposed himself fairly in the pursuit of a legal remedy, which the injunction of the chancellor did not design to reach, and that in resorting to an adverse and coercive measure against *Jones*, he was not within the terms of

that injunction, receiving a preference such as was there inhibited. But it was this very pledge mentioned in the bill before *Baltimore* county court, that had been enjoined, and over which the chancery court had already assumed jurisdiction: and it was an error to assume, that the preference which *Albert* claimed and *Jones* had promised, could be enforced in another *forum*. The error was in resorting to another, when the jurisdiction had already attached in a *forum* of concurrent power with *Baltimore* county court. It may also be assumed with regard to the action of *Baltimore* county court, that they did not view the case in the light in which the present bill presents it, otherwise the proceedings before that court would have been arrested before the decree, and the conflict of jurisdiction which resulted, would have been obviated.

The chancellor was therefore right, in regarding the proceedings of the 14th of September 1846, as the commencement of this controversy, and that it drew to the court of chancery the whole litigation in regard to the distribution of *Jones*' estate. More especially, as the injunction there was intended to prevent *Albert and wife* from securing to themselves a preference in any way; and their resort to another tribunal, designed or not, was, under the circumstances, a disregard of the chancellor's injunction. If even not so in form, and upon its face, yet in substance and effect it amounts to an evasion of that injunction. Be that as it may, the court of chancery had drawn to itself the whole subject of *Jones*' insolvency, and his intent to prefer certain creditors, more particularly *Albert and his wife*.

In any view of the case, that tribunal was fully competent to grant such relief to them as they were entitled to, and was the appropriate tribunal, to which, under the circumstances, they should have applied. Their application to another naturally, if not necessarily, involved a conflict of jurisdiction. The court of chancery had enjoined *Jones* from giving, and any creditor, these parties particularly, from receiving, a preference out of his estate, which was alleged to be insolvent. It was alleged further, that he could not avoid applying for the benefit of the insolvent laws, and in contemplation of that fact

such preference is void. He did subsequently so apply, and the question (not now necessary for us to determine,) was submitted and fully argued before this court, as well whether this proceeding of *Albert and wife* was not a device to obtain such a preference, as whether it was not also a violation of the injunction, to that effect, in the original bill. Had *Albert and wife* asserted this preference in the court of chancery, on the ground, that *Jones*, when in solvent circumstances, had agreed, and was bound by such agreement, to secure their debt, and particularly by a conveyance of the "*Wheatfield Inn*," and had they claimed in that court, where the whole matter was submitted, the specific performance of this agreement, we are not now to say, whether such agreement would not have been sustained against the bill of the other creditors. That court, at all events, was, under the existing state of things, the proper tribunal, with full powers to administer ample relief.

*Jones* was already under an injunction not to convey any property, the "*Wheatfield Inn*" particularly, to any creditor. He could not, therefore, convey it, as a preference, without a contempt of the chancellor's injunction. Yet we find *Albert and wife* applying to *Baltimore* county court for an injunction to the same intent against *Jones*, manifestly contemplating to reserve it for execution upon their decree, which was nearly matured in that court. Not until the proceeding was consummated, the decree obtained, and the *fi fa.* levied upon the "*Wheatfield Inn*," is the existence of the original bill in chancery recalled to mind. Then *Albert and wife*, on the 23rd of February 1847, first filed their answer to this original bill, and there again alleged the indebtedness of *Jones*, his misapplication of the trust in his hands, and his promise to convey to them the "*Wheatfield Inn*," to replace that fund. The jurisdiction is then recognized over the same subject matter, that forms the basis of proceedings in both courts, the indebtedness and insolvency of *Jones*, and his promise to secure the debt by assignment of the "*Wheatfield Inn*." And upon this averment and answer, the case in the chancery court now sleeps under the injunction. The property which was enjoined in both courts, was brought within their grasp by the exe-

cution out of *Baltimore* county court, and the answer concludes: "These defendants having no further interest or concern in the premises, as they conceive, pray to be dismissed with their costs," &c.

We are not unmindful, in reviewing the position of the parties in this case, and their proceedings, that the bill on the equity side of *Baltimore* county court, although alleging the promised security of the "*Wheatfield Inn*," sought to make the claim of complainants there available, by a decree against *Jones*, in money. But the attempt, afterwards, to restrain the conveyance of the "*Wheatfield Inn*," under another bill in the same court, when it had already been enjoined in chancery, could have had no other view, than to reserve it for the execution which was afterwards levied upon it. In the opinion of this court, the whole proceeding was in conflict with the cause which was pending on the same subject in the high court of chancery. *Baltimore* county court, as a concurrent court of equity, was not, by the complainants there, or by *Jones*, advised of all the facts and proceedings, prior to the filing of their bill, so as to enable that court to act and decide with knowledge; and, therefore, to prevent or counteract this conflict of jurisdiction, it was competent for the court of chancery to restrain the parties from the execution of their decree, and to treat the whole proceeding in *Baltimore* county court as a nullity.

It may be necessary here, in conclusion, to distinguish between this case and *Ellicott vs. U. S. Ins. Co.*, *ante*, 307, which was decided at the last term of this court, and has been invoked here, in support of the proceedings of *Albert and wife*. The injunction, in that case, imposed no restrictions upon the creditors, in the prosecution of their claims. The decree was limited to the appointment of a receiver, and the preservation of the property of the concern. It did not, at the time, contemplate or embrace any ulterior disposition of it; and *Ellicott* had neither the right nor the opportunity to prefer his claim in the court of chancery. To have been stayed in his legal remedy, would have exposed his claim to limitations; and, moreover, his suit was instituted before the appointment of the receiver. Had the court of chancery possessed such a jurisdiction as would

have authorised *Ellicott* to establish his claim there, it is inferrible that they would not have sanctioned his proceeding at law; and the cases would be more analogous. If the decree in the cause, had called upon the creditors to file their claims, it is there said, "the creditor who should institute or continue to prosecute his claim, would be enjoined." But the court of chancery could give *Ellicott* no relief. His remedy was at law alone, and he was not bound to wait until his claim might be subjected to limitations. No fraud or collusion was imputed to him, and he was not to be restrained, "unless there was a proceeding pending, under which, he had a right to go in and prove his claim."

We have shewn that the appropriate remedy for *Albert*, was, to have gone into the court of chancery, upon the bill of *Hopkins*, both to avoid the conflict of jurisdiction, and to assert his right to be secured, in compliance with the subsisting agreement of *Jones*. His proceeding was pending in court, and that court had ample power to afford him the relief, which he sought in another form, in another court of concurrent jurisdiction; and by thus proceeding, subjected his claim to be defeated entirely in that *forum*.

The order of the chancellor, therefore, continuing the injunction, is affirmed.

ORDER AFFIRMED.

Note by Reporter.—In the case of *Kettlewell vs. Steuart*, decided at June term 1850, and not yet reported, the court, Chambers, Magruder and Spence. J., sustained a deed similar in its provisions to the one referred to in this case, Martin and Frick, J., dissented, and Dorsey, C. J., did not sit in the cause, Thus it seems the court are equally divided in reference to the validity of such deeds, Chambers, Magruder and Spence, J., being for, and Dorsey, C. J., and Martin and Frick, J., against sustaining them.

## John B. Emery and Cyrus Gault, and Joseph Yager, *vs.* Cornelius H. Owings.—*June* 1849.

Where arbitrators failed to give notice to the parties interested, of the time and place of their meeting, to act upon the matters submitted to their arbitration, their award was, for this reason, Held to be invalid and void.

Where arbitrators, to gain information respecting the matters in dispute, examined the books of one of the parties, without notice to, and in the absence of the other party, and without proof of the correctness of the statements and entries in said books, it was Held, that such conduct would vitiate and render null their award.

A lien upon certain real estate was given by a mortgage, to secure the payment of a sum of money to be ascertained by the award, of two persons to be chosen by the parties to the deed, with power to said persons, in case they disagreed, to chose an umpire. And the said referees, taking the *data* stated in the mortgage as their rule or guide, were to make out their award and return the same to the parties in writing, within thirty days after their appointment. Held:

That this mortgage was a security and lien for the amount of an award to be thus made, and for nothing more, and the award having failed, by reason of misconduct in the arbitrators, the mortgagees can have no relief in equity upon a bill for the sale of the mortgaged property, and the specific execution of this contract.

The parties having themselves stipulated the mode by which the amount, to be a lien on the lands, should be ascertained, a court of equity has no jurisdiction to compel the parties to adopt any other mode.

There being no proof that the defects in the award were at the instance or by the procurement of the complainants, their bill should have been dismissed, without prejudice.

Appeal from the Equity Side of *Baltimore* county court.

The bill in this case, was filed on the 14th of September 1843, by the appellants, against the appellees, alleging that on the 25th of July 1836, *Beale, Cornelius H.* and *Caleb D. Owings*, the owners of "*Fox Rock Quarry*" in said county, being desirous to construct a private road from said *Quarry*, to the line of the *B. & O. Rail Road*, entered into a contract in relation to the construction thereof, with a certain *Charles Wood*, your orator *Yager*, and one *Edward Green*, the terms of which are particularly set forth in a certain indenture, dated said 25th of July 1836, and exhibited with the bill. After

stating the assignment of said *Wood's* interest in said mortgage to *Emery and Gault;* the bill avers that the complainants advanced large sums of money, and constructed the said road and bridge mentioned in the mortgage, as contemplated by the parties thereto, and that after said road was thus completed, and after the expiration of five years from the date of said mortgage, to wit, on the 18th of August 1841, arbitrators were appointed according to the provisions of said deed, to estimate the value of said road, who being unable to agree, appointed an umpire; and that on the 28th of September 1841, two of said arbitrators made out and delivered to the parties, an award in writing, signed and sealed by them, whereby they awarded and determined that the parties of the first part to said indenture, should pay to the parties of the second and third parts thereto, or their assigns, as the value of said road and bridge, the sum of $5130, and interest on $1833.31, part thereof, for five years, and interest on $5500, for two months, which sum the defendants have not paid; and the bill then prays for a decree for a sale of the mortgaged premises, the "*Fox Rock Quarry*," to pay the sum due the complainants on said award, and for general relief.

*Exhibit A* is the indenture executed on the 25th of July 1836, between *Beale Owings*, *Cornelius H. Owings*, and *Caleb D. Owings*, of the *first* part, *Charles Wood* and *Joseph Yager*, trading under the firm of *Wood & Co.*, of the *second* part, and *Edward Green*, of the *third* part. It recites, that a decree had been recently passed by *Baltimore* county court, in a cause in said court, wherein *Noah Worthington*, and *Comfort Worthington*, were plaintiffs, and *Caleb D. Owings*, and others, defendants, awarding to the defendants a certain private way over the lands of the said *Worthingtons*, for which said defendants were to pay them the sum of $700. The deed then, after setting out the contract between the parties in reference to the construction of the road, which is fully stated in the opinion of this court, further recites: "And whereas, for the purpose of securing to the parties hereto, of the second and third parts, and their representatives, at the period hereinbefore mentioned, the payment of such sum of money as shall be awarded by the arbitrators so as aforesaid to be appointed, or a majority afore

said, as the value of the said road, in the manner hereinbefore provided for, with interest as aforesaid, the said parties hereto of the first part have consented and agreed to execute these presents. "Now this indenture witnesseth," &c., conveying to the parties of the second and third parts, "all that piece of ground called "*The Fox Rock*," which is contained within the following metes and bounds, beginning," &c., "containing six acres more or less, together with the use and privilege of the private road hereinbefore mentioned, and all other the rights, privileges, advantages and appurtenances, to the same belonging, or in any wise appertaining." The condition of this deed is, that if the parties of the first part, or their representatives, "do, and shall, at the expiration of five years from the date hereof, well and truly pay, or cause to be paid unto the" parties of the second and third parts, or their legal representatives, "such sum or sums of money as shall be awarded by the arbitrators to be appointed as hereinbefore provided for, or a majority of them, as the value of the aforesaid road, to be ascertained and determined in the manner hereinbefore stated, with legal interest, semi-annually, on one-third of said amount, from the respective periods of making the advances aforesaid, then this indenture to be void," &c. It also contains a covenant by the parties of the first part, to execute further assurances "for the better securing to them, the said parties of the second and third parts, such sum or sums of money as shall be awarded to them, the said parties of the second parts, by the arbitrators so as aforesaid to be appointed, or a majority of them, in the manner hereinbefore stated, with interest, as aforesaid, according to the purport, true intent and meaning hereof."

On the back of this deed was the following endorsement: "We whose names are hereunto subscribed, agree to extend the time for the payment of the within mortgage, to *Beale, C. H.* and *Caleb D. Owings*, to the 25th day of July 1843, in case it be not paid punctually at maturity.

BALT., *Dec.* 12*th*, 1836. EDWARD GREEN,

"Witness—*J. B. Emery.*" JOSEPH YAGER."

The answers of the defendants admit the execution of the mortgage, and that divers sums of money were advanced by

the parties thereto of the second parts, and applied for the purposes set out in the bill in the construction of said road and bridge. They also admit that a continuous rail road from the "*Fox Rock Quarry*," to the *B. & O. Rail Road*, was completed in the early part of the year 1841, but they altogether deny that said road was located as required by the terms of the agreement, as contained in said mortgage, or that the same was completed within the time required by the terms and true construction thereof. They also admit the appointment of arbitrators as charged in the bill, and that an award was made by them, but aver, that they had no notice of the meeting of said arbitrators immediately preceding the making of said award, nor of the meeting when said award was made. That at the first of said meetings, as defendants have since heard and believe, important testimony was given on behalf of the complainants in regard to the value of iron rails placed on said road which the arbitrators charged as so much iron furnished by the complainants, whereas respondents charge that said iron is the property of the *B. & O. Railroad.*

A commission was then issued, and testimony taken in relation to the amount of advances made by the complainants, towards the construction of the road; the conduct of the arbitrators in making their award, and various other matters, not necessary to be stated, the purport of which, so far as it relates to the award, is fully stated in the opinion of this court.

The court, (LE GRAND, J.,) on the 18th of May 1847, passed an order, dismissing the bill, with costs, and delivered the following opinion:

"In the view which I take of this case, it is not necessary that all the questions, so fully argued by the solicitors of the respective parties, should be decided. The main and all-important question is: *For what is the mortgage, of date the 25th of July* 1836, *a security?* The bill is filed for the purpose of procuring a decree, to sell the mortgaged premises to pay the sum awarded to be due, by the award filed among the proceedings and made part of the bill. If the mortgage be only a security for the advances ascertained by the *award*, and if there be no sufficient award, then this court cannot de-

cree a sale of the property. A careful examination of the mortgage has satisfied me, that it is a security for nothing but the amount ascertained by the award to be the value of the road. After several recitals in regard to the road, the deed proceeds to declare, that the mortgagors "have agreed to *purchase* the said road, at the termination of five years," &c., and "to pay" the mortgagees "the full value thereof, *to be fixed and ascertained*" by referees, &c. It is then provided that, "Whereas, for the purpose of securing to the parties hereto of the second and third parts, (the mortgagees,) and their representatives, at the period hereinbefore mentioned, the payment of such sum of money as shall be awarded by the arbitrators so as aforesaid to be appointed, or a majority aforesaid, as the value of the said road," &c., "the said parties hereto, of the first part, (the mortgagors,) have consented and agreed to execute these presents."

It is manifest that the mortgage was only given as a security for the payment of such sum as might be awarded by the arbitrators, and not for the value or costs of the road, without reference to any award. This being so, if there be no sufficient and valid award, it is obviously clear, that this court cannot decree a sale of the mortgaged premises, to pay that for which they never were intended or designed to be a security. But it is supposed, and it has been so argued, by the counsel for the complainants, if the award be defective, or in other words, if there be no award under the prayer for general relief, this court is competent to decree a sale of the property, to secure the payment of so much as may be found to be justly due the complainants, agreeably to the *data* specified in the mortgage. To this view it is but necessary to answer, that the property is not mortgaged to pay anything but the sum ascertained by the award. Had the mortgage been a security for the payment, to the mortgagees, of the value of the road, on the *data* contained in it, the court would decree a sale of the property: for although there could be no recovery of the sum in the award, yet as there is no such thing known to equity as the distinctions in actions, which are recognised at law, the complainants would be entitled to a decree for such sum as they might show

themselves to be justly entitled. But such is not the case; the mortgage was not given to secure anything, but the payment of the sum awarded by the referees, and if there has been a failure to make a valid award, or if there has been a departure from the terms of the contract, the complainants must go into a court of law, to recover what they are entitled to, under any new contract which they may have made with the defendants. For although the law will not admit of the alteration of a sealed by a parol contract, yet its justice forbids, that one man may enjoy the fruits of the labor of another, without paying for it. The failure to recover on the covenant, does not prevent a recovery *in assumpsit*, on the faith of the new contract, according to the value of the thing made or done under it. So, therefore, if the road was made and accepted on a contract different from that specified in the mortgage, the complainants are entitled to make such contract the groundwork of an action, but they cannot hold the mortgaged premises as a specific pledge for the fulfilment of such contract, simply because they were never so pledged. This being so, the only question remaining to be considered, is, whether there be a sufficient and valid award in this case?

It is conceded by the counsel for the complainants, that the award is bad, in so far as it relates to interest; but he insists that this does not invalidate the award: for awards may be good in part and bad in part. This is undoubtedly true, when the matters in the award are independent of each other. It is not necessary I should consider, whether the subjects of this award are so or not, for it is manifestly bad on various grounds: 1st. There is no evidence that it was *delivered* to the parties to the mortgage. One of the witnesses proves, that he thinks a copy of it was given to one of the mortgagors, but he does not say when: whilst the terms of the mortgage require, that it should have been made and delivered before the expiration of thirty days from the time of the reference. But apart from this, a copy should have been delivered *to each of the parties*. 1 *Bacon*, 345. *Kyd on Awards*, 116. *Huntgate vs. Meade*, *Cro. Eliz.*, 885.

Besides this, the parties should have had notice of the *ad-*

*journed* meetings, and of their objects; of the referees, &c. 6 *H. & J.*, 486, and 8 *Pet.* 178, 179. This is not proved. Again, the referees, without the knowledge of the mortgagors, took improper evidence, in that they examined the books of the complainants for the purpose of ascertaining the value of iron on the road. On this ground, all the analogies of the law, show, that the award is bad in whole. *Kyd on Awards*, 354, 356. *See*, also, the case of *Van Cortlandt vs. Underhill*, 17 *Johns.*, 405. Holding these views, the bill of complaint must be dismissed. But if the road was made on a different line from that specified in the mortgage, at the instance and request of the defendants; or in other words, if the claim of the complainants arose out of a contract different from that in the mortgage, and this can be made to appear; the law does not withhold from them a remedy to recover the amount due them for their work and labor: but this court cannot hold the property as security for any thing *but for that which is stipulated in the mortgage*. It is for the parties alone *to make* their contracts, that of the court being confined to their enforcement.

It is ordered this 8th day of May, A. D. 1847, that the bill of complaint in this case, be, and the same is hereby dismissed, with costs."

From this order the complainants appealed. Other questions were presented by the record, which have not been referred to here, because they were not decided in this cause; and, besides, they will be found fully reported in the cases of *Emery and Gault, vs. Owings*, 6 *Gill*, 191; *Owings and Griffith, vs. Emery and Gault, ib.*, 260. And *Owings, use of Green, vs. Emery and Gault, ante*, 405.

The cause was argued before Spence, Magruder, Martin and Frick, J.

By Hinkley and Nelson for the appellants, and
By McMahon and Brent, for the appellees.

Spence, J., delivered the opinion of this court.

The object of the bill in this case is to obtain a decree for the sale of the mortgaged premises, for the payment of a sum of

money, charged to be due under an award made in pursuance of the provisions of a mortgage deed, bearing date the 25th July 1836.

The questions to be decided, arise under the contract recited in the deed, which is as follows:

"Whereas, it is contemplated to continue the said private road from its nothern termination through the grounds of *Nicholas Owings*, to the ground hereinafter described, known by the name of *Fox Rock*, so as to form one entire road or way, from said last mentioned premises to the *Patapsco Falls*, and thence by means of a bridge to be constructed over said *Falls*, to intersect the line of the *Baltimore and Ohio Rail Road*. And whereas the said parties hereto, of the second and third parts, have agree d to advance to the parties of the first part hereto, a sum of money, not exceeding the sum of five thousand and five hundred dollars, which sum, or so much thereof as may be necessary to be applied by them to the payment of the amount awarded by the county court aforesaid, to the said *Noah* and *Comfort Worthington*, and to the costs of the court and other expense in obtaining the aforesaid decree, and to be advanced and applied in the construction of the aforesaid entire road from *Fox Rock* to the *Baltimore and Ohio Rail Road*, including the bridge to be constructed over the *Patapsco Falls*. And whereas the parties of the second and third parts hereto, have agreed to give to the said parties of the first part a credit of five years from the date hereof, upon the amount which has or shall hereafter be advanced by them for the purposes aforesaid, to be ascertained and determined as hereinafter provided for with interest on one-third part thereof only, semi-annually, to commence as the advances are made, and to terminate at the expiration of the said five years, and interest on the whole amount of said advances, or so much thereof as may remain unpaid from and after the expiration of said five years. And whereas the said parties hereto of the first part, have agreed to purchase the said road at the termination of the said five years from the date hereof, and to pay to the parties hereto of the second and third parts the full value thereof, to be fixed and ascertained as the *data* thereof, by reference to the amount adjudged by the

county court aforesaid, (of *Baltimore*,) to the said *Noah* and *Comfort Worthington*, for the costs of court, and all necessary expenses in obtaining the decree for said road, and all costs of constructing said road, and the bridge to be constructed over the *Patapsco Falls*, as aforesaid, taking also into consideration, and making allowance for the wear and tear of the said road, and the injury and the deterioration thereof, by reason of the use and occupation of the same, during the said term of five years. And it is hereby agreed between the parties hereto, respectively, that the value of the said road, upon the principles above laid down, shall be ascertained and determined at the expiration of the period of said five years, by two competent and disinterested persons, one to be chosen by the parties hereto of the first part, and the other by the parties hereto of the second and third parts, with power to said persons, in case they disagree as to the said value, to choose a third person, and the said referees, or a majority of them, taking the *data* hereinbefore stated as their rule or guide, shall make out their award or valuation of said road, in writing, and return the same to the parties hereto, or their representatives, within thirty days after their said appointment."

We have made this large extract from the mortgage deed of the 25th of July 1836, because, according to our view, all the questions arise out of it which are to be decided in this case. The complainants' bill charges, that the rail road and bridge were constructed by the appellants, within the time prescribed by the contract, recited in the mortgage deed.

The answers of the respondents, admit, that a road and bridge were constructed by the appellants or their assignees, but deny that the road and bridge were constructed according to the meaning and intention of the parties as set forth in said contract.

The bill also charges, that persons were appointed by the parties, as arbitrators, at the termination of the five years, as provided for by said contract, to ascertain the value of the road and bridge, and the cost of the work; that the arbitrators made their award in pursuance of their authority, and made a return thereof to the parties.

The answers of the respondents admit the appointment of

the arbitrators, and that they made an award, but charge that the course and conduct of the arbitrators was so irregular and illegal, as vitiated and rendered null and void their award.

The answers charge, that the arbitrators gave no notice to the appellees of the time and place of their meetings, when acting upon the subject matters submitted to their arbitrament and decision. That without the knowledge or consent of the appellees, they examined the books of the appellants to obtain information touching the advances made by the appellants, when the appellees were not present.

The first question presented for decision, is the validity of the award. And first, as to the failure on the part of the arbitrators to give notice to the parties. The evidence, so far from proving that notice was given by the arbitrators to the respondents, of the times and places, and objects of their meeting, that our conclusion from the evidence of the arbitrators themselves, is, that no such notice was given. And the conclusion is quite as clear, that the arbitrators, *Burton* and *Moke*, at their meeting in the city of *Baltimore*, in the absence of the respondent, examined the books of *Emery and Gault*, and an account kept there, of the cost of the road, without requiring or obtaining any further proof by oath of witnesses, or otherwise, as to the correctness of the charges, or the fact of furnishing the materials therein charged, to the road.

In the case of *Rigden vs. Martin*, 6 *Har.* and *Johns.*, 406, the court say, "That the parties ought to have notice of the time of meeting, is a position so strongly supported by common justice, that it would seem not to require the aid of authorities."—"Where the person to whom the parties have agreed to refer the matters in dispute has consented to undertake the office, he ought to appoint a time and place for examining the matters, and give notice of such appointment to the parties, or their attorney." *Kydon Awards*, *p.* 95. We hold, therefore, this award invalid and void, both upon reason and authority, for this cause. Again, the conduct of the arbitrators in examining the books of *Emery and Gault*, without notice to, and in the absence of, the respondents, and without proof of the correctness of the statements and entries in those

books, was conduct so inconsistent with all the principles of law recognized in the impartial administration of justice, as would vitiate and render null and void their award. To hear the cause of a party in his absence, and without notice, would be bad enough in all conscience, but in his absence, in such a case, to decide his cause upon the declarations of his antagonists, made when he was absent, surely is without precedent. An award made under such circumstances, we cannot sanction. But the argument of the appellants' counsel insists, that the appellees by their acquiescence and acts have waived all objections to the irregularities and illegalities of this award. We find nothing in the record to warrant this conclusion. There is no evidence in the record of the delivery of a copy of the award to these parties, and especially within the time prescribed by the contract.

It is true, that at the expiration of the time limited, to wit, five years, they took possession of the railroad. This they did, independently of any authority derived from the appellants. But it is insisted, that as the appellants have performed their part of the contract, they have advanced their money, constructed the road and bridge, and that any irregularity or improper conduct on the part of the referees ought not to prevent the recovery by them of the money advanced, and for the labor bestowed in the construction of this road and bridge. This brings us to the interpretation of the contract.

By the mortgage deed, a lien is given upon certain real estate, described in said deed, to secure the payment of the cost of the erection of the railroad and bridge, described in the mortgage. The amount or sum which the mortgage deed was given to secure, and which was a lien upon the land, was to be ascertained by the award of two persons, one to be chosen by the parties thereto of the first part, and the other by the parties thereto of the second and third parts, with power to said persons, if they disagreed, to choose a third person, and the said referees, or a majority of them, taking the *data* as stated in the deed as their rule or guide, were to make out their award or valuation of said road in writing, and return the same to the parties, or their representatives, within thirty days after their appointment

It is clear from a fair interpretation of this contract, that this mortgage is a security and lien for the amount of an award thus made, and for nothing more. We have before said, that the award relied on in this case, and for the payment of which the bill claims a decree for the sale of the mortgaged premises, is for the reasons before stated, a nullity. What relief, then, can a court of equity afford in this case, and preserve the lien? A court of equity cannot order or decree the appointment of other and different arbitrators. This would be to make a new contract for the parties, when the prayer of the bill is for a decree, for the specific performance of the contract set forth in the bill. If a court of equity were to ascertain the amount of advances made in the construction of the road and bridge, it would not be in accordance with the contract; for by the contract the parties have agreed, that the ascertainment of the amount for which the mortgage is to be a lien, is to be made by persons of their own choice. The parties having stipulated the mode by which the amount to be a lien on the land shall be ascertained; a court of equity has no jurisdiction to compel the parties to adopt any other mode. *Vide* 2 *Simons and Stewart*, 418, *Agar vs. Marklew.* 6 *Ves.*, 815. 12 *Ves.*, 400. Against this doctrine, much reliance, in the argument, was placed on the case of *Cheslyn vs. Dalby*, 2 *Younge and Collyer's Reports*, 170. We have examined this case with care and interest, to learn if it warranted the conclusion deduced from it, but in vain.

This was an application for the reconveyance of premises mortgaged for the security and payments of certain accounts, to be ascertained by arbitration, which failed, by reason of the death of the arbitrator. "What is now to be done?" says *Alderson, B.*, "Here the arbitration originally agreed on, has, by the death of the arbitrator and umpire, been wholly frustrated." "Here," (says the court,) "the plaintiff, *Cheslyn*, comes into equity to ask relief, and before he can obtain that relief he must of course perform what the court shall deem to be equitable, that is to say, the substance of his agreement." In the case of *Cheslyn* and *Dalby*, there was an agreement for a specific mode of ascertaining the balance due; that mode failed by events over which the parties had no control. But, says

the court, "if *Mr. Cheslyn* has admitted that there is a balance due, and has, by a deed executed under such circumstances, as that it ought to be enforced, agreed that his estate shall be subject to a lien for that balance, why am I to decree a reconveyance of the estate, without compelling him to fulfill that part of his agreement?" The case was for this reason referred to the master, that he should take the account and ascertain the balance. The case we are called upon to decide, differs in this controlling particular, from the case of *Cheslyn vs. Dalby*; the latter case was an application to a court of equity for a reconveyance of mortgaged premises, the reference to ascertain the balance due having failed, by reason of the death of the arbitrator. This case is an application by the mortgagees to a court of equity, to enforce the specific performance of a contract, by the payment of a sum of money, to be ascertained and determined by the award of arbitrators, to be chosen by the parties, in the mode and upon the *data* prescribed in the mortgage deed; but we have seen, that there is no award in this case which the court can enforce.

If this were an application by the mortgagors for a reconveyance of the mortgaged premises, upon the ground that there was no legal and valid award by reason of the improper course and acts of the arbitrators, the answer would be, true, but you shall do equity before you receive equity; and we will have an ascertainment of the value of the railroad and bridge, as stipulated in your contract, and you shall pay the amount thus ascertained, before we grant you the relief asked. In this case, although we are of the opinion, that the court did not err in not granting to the complainants the relief sought by the bill, yet inasmuch as there is nothing in the record to show, that the vices in the award were, at the instance, or by the procurement of the appellants, we think the court below did err in not dismissing the bill without prejudice, and for this reason we reverse the decree of the county court, with costs, to the appellants, and will sign a decree dismissing the bill without prejudice and without costs.

DECREE REVERSED, AND BILL DISMISSED WITHOUT PREJUDICE.

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ABATEMENT.

1. Upon an appeal to the December term of this court 1847, errors were assigned, and a rule argument entered at June term 1848, the next succeeding term. The cause was set down for trial at December term 1848, when, at the call of the cause, the counsel of the appellee appeared, and suggested the death of his client, in January 1848. HELD, that the cause did not abate. *Carroll vs. Bowie*, 34.

2. At common law, if the *plaintiff in error* dies after errors assigned, it does not abate the writ; and a writ of error does in no case abate by the death of the *defendant in error*, whether it happen before or after errors assigned. *Ib.*

3. The act of 1815, ch. 149, sec. 6, declares, that in all appeals or writs of error, the same shall not abate by the death of either party, if the proper person necessary to be made party shall, at the first or second term succeeding the death, appear for the purpose of prosecuting or defending the same. *Ib.*

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*See* EVIDENCE, 1, 5, 8, 16, 20, 21.

AGENT. *See* CONTRACT, 5.

AGREEMENT. *See* CONTRACT, 5.

APPEAL.

1. In an action of debt, an appeal will not lie from a judgment on a demurrer, without waiting for the final judgment, after ascertainment of damages, upon a replication assigning breaches of the condition of a bond declared upon. *Wheeler, et al., vs. The State use of Bateman*, 33.

2. The 3rd sec. of the act of 1835, ch. 380, shows, that a defendant who has answered a bill for an injunction, may appeal from the granting or refusal to dissolve it upon motion, without waiting for the answers of his co-defendants. *Barnes, et al., vs. Dodge*, 109.

3. On the 20th of October 1846, *J S* applied for relief under the insolvent laws, to the commissioners of insolvent debtors for the city and county of *Baltimore*, who granted him a final discharge, appointed his permanent trustee, and transmitted the proceedings to *Baltimore* county court. His real estate was then sold by order of said court, and the proceeds brought in for distribution. The cause was then referred to the auditor in insolvency, with directions to give notice to the mortgage and lien creditors to file their claims before a certain day, and to state accounts appropriating the funds to their payment. The auditor, in account B, applied a large sum to *D's* mortgage, filed in pursuance of said notice, being first in priority, dated in 1840, and purporting to secure the sum of $16,000, loaned for the term of ten years; but, by an adjustment made between *D* and the trustee, on the ground of alleged usury, the sum actually loaned was computed at $11,495, with interest from 1840. By this application, the fund was exhausted before reaching the mortgage of the appellants who thereupon filed the plea of usury against *D's* claim, which in account C was excluded. These two accounts being submitted, *Baltimore* county court ratified the first, allowing the claim of *D*, as adjusted, and rejected the second. Upon the motion to dismiss the appeal from this order, it was HELD: That the order from which this appeal was taken, being one from the county court, in the exercise of its special jurisdiction over the estates of insolvent debtors, from which no appeal will lie, the motion must prevail. *Carter and wife, vs. Dennison*, 157.

APPEAL.—*Continued.*

4. From a special limited jurisdiction, no appeal lies to any other tribunal, and this rule applies to the insolvent courts of this State, as courts of limited jurisdiction. *Ib.*
5. An appeal will not lie from the judgment of a county court superseding a writ of *certiorari*, by which proceedings before magistrates, under the act of 1793, ch. 43, against a tenant holding over, were brought before said court. *Crockett vs. Parke*, 237.
6. The right of appeal, given by the 6th sec. of the act of 1785, ch. 87, is confined to judgments of the county court in civil suits, actions or prosecutions originating therein, and does not extend to its judgments, when acting as an appellate tribunal, or when exercising a *quasi* appellate jurisdiction. *Ib.*
7. The uniform judicial interpretation of this act, from its passage to the present time, has denied the right of appeal from judgments of county courts, on appeals from judgments of justices of the peace, rendered under the acts of Assembly for the speedy recovery of small debts, on motions for new trials, for the postponement or continuance of a cause, or any other matter resting exclusively in the sound discretion of the county court. *Ib.*
8. An appeal will lie from a decree of the court of chancery, upon a mortgage executed in conformity with the provisions of the act of 1833, ch. 181, relating to mortgages in *Baltimore* city. *Williams vs. Williams*, 392.
9. Any interference with the right of appeal, wherever it exists, must be upon strong grounds, and a clear manifestation on the part of the legislature, that they designed to withdraw it. *Ib.*
10. In providing a summary mode of obtaining a decree, the legislature did not intend, by the act of 1833, ch. 181, to limit the general jurisdiction of the court of chancery, (from whose decrees, at all times, the right of appeal exists,) in cases of mortgages. *Ib.*
11. An appeal will not lie from a decree, which, upon its face, appears to have been made by consent of parties; but such an objection must be taken upon the final hearing, and not upon motion to dismiss. *Ib.*
12. An appeal will not lie from a special and limited jurisdiction, unless, by the act creating such peculiar jurisdiction, the right is expressly given. *Ib.*
13. The judgment of a county court, overruling a motion to quash a writ, is a mere interlocutory order from which an appeal will not lie. *Welch vs. Davis*, 364.

*See* PRACTICE IN THE COURT OF APPEALS.

ARBITRATION—AWARD.

1. Where arbitrators failed to give notice to the parties interested, of the time and place of their meeting, to act upon the matters submitted to their arbitration, their award was, for this reason, HELD to be invalid and void. *Emery, et al., vs. Owings*, 488.

ARBITRATION—AWARD.—*Continued*

2. Where arbitrators, to gain information respecting the matters in dispute, examined the books of one of the parties, without notice to, and in the absence of the other party, and without proof of the correctness of the statements and entries in said books, it was HELD, that such conduct would vitiate and render null their award. *Ib.*
3. A lien upon certain real estate was given by a mortgage, to secure the payment of a sum of money to be ascertained by the award, of two persons to be chosen by the parties to the deed, with power to said persons, in case they disagreed, to chose an umpire. And the said referees, taking the *data* stated in the mortgage as their rule or guide, were to make out their award and return the same to the parties in writing, within thirty days after their appointment. HELD: That this mortgage was a security and lien for the amount of an award to be thus made, and for nothing more, and the award having failed, by reason of misconduct in the arbitrators, the mortgagees can have no relief in equity upon a bill for the sale of the mortgaged property, and the specific execution of this contract. *Ib.*

ASSIGNOR AND ASSIGNEE.

*See* PRINCIPAL AND SURETY, 3, 4, 5.

ASSUMPSIT.

1. *W* sold to *B* a slave, and received one hundred dollars on account of the purchase money. The slave was then sick and not delivered, but delivery was promised at a future day, and before it took place, though requested, the slave died. HELD, that *B*, under the circumstances, was entitled to recover the money advanced by him; and that although it may have been after the contract of sale that the defendant promised to refund, yet such promise was not founded upon a *nude pact*. *Brooke Adm'r vs. Warring*, 5.
2. Under the original contract, the failure to deliver the negro, would have bound the vendor to pay whatever amount of damages resulted to the vendee by reason of such failure, and the substitution of a sum certain, as damages by agreement, would not be without consideration. *Ib.*
3. At common law, where one joint obligor has satisfied the bond, his remedy against his co-obligors is in *assumpsit* for contribution. *Carroll vs. Bowie*, 34.
4. In such a case, payment by one, works a satisfaction of the bond; and the only remedy is, to recover back from *the other sureties* in the bond, their proportion of the payment; or, from the principal the whole amount. *Ib.*
5. One co-promissor, who pays a debt barred by the act of limitations, against the consent of his co-debtor, cannot maintain an action for contribution against such co-debtor. *Ellicott vs. Nichols*, 86.

*See* PLEAS AND PLEADINGS, 11

ATTACHMENT.

*See* PLEAS AND PLEADINGS, 3, 11.

BANKS.

1. The usages of banks have grown up to be a part of the settled law of the land, and in obedience thereto, personal notice is dispensed with, and the indorser is charged by the bare deposit of notice in the post office, even if it never comes to hand. *Bell vs. The Hagerstown Bank*, 217.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A draft was regularly protested for non-payment, in *Georgetown, D. C.*, and the usual notices to the drawer and endorsers, deposited in the P. O, the same evening, by the *notary*, directed, under cover, to *B*, the cashier of the appellee in *Hagerstown*. It was then proved by B, that he had a distinct recollection of receiving these notices, and is sure that, on the same day, he sealed and directed them to the drawer and endorsers, at their respective post offices. He does not recollect the exact time of their receipt, but remembers no instance where such notices were not received in due time, *i. e.*, on the second day after their date, and should have remembered an instance of longer delay as unusual. That the bank has a regularly appointed messenger, whose duty and practice it is to come to the bank daily, about the hour of closing, when he either delivers to him all letters and notices for the P. O., or, when he leaves before the messenger arrives, places such letters carefully on his table, and there is a general understanding that the messenger is to take them. He cannot say which course was adopted in this instance, but did not find the notices on his table next morning, and has never so found them. By the *teller* of the bank, that it is his practice, when the cashier leaves before the messenger arrives, to see that the letters are taken by the latter,—is very particular in this respect, and recollects no instance where they were not taken the same day. By the *messenger*, that it was a part of his duty and his invariable custom, to be at the bank at the hour of closing, or very soon after, to take the letters and notices to the P. O. He either receives them from the cashier in person, or, if he has left, takes them from his table. Has never failed to obtain them, and it has been his uniform custom to deposit them directly in the P. O., which he has never failed to do, except in one instance particularly described. HELD: That this evidence of notice of non-payment to the indorser, was legally sufficient to charge him, and to warrant an instruction to the jury that if they believed it, they must find for the plaintiff. *Bell vs. The Hagerstown Bank*, 216.
2. Where the holder and the party to be notified reside in the same place, personal notice is required, or it must be left at his residence or place of business, unless, by the usage of a particular place, a different mode is resorted to. *Ib.*
3. In large commercial towns the uniform practice now is, to reach the party to be affected with notice, through the post office, when both reside within the limits of the penny-postman, but it must be shown

BILLS OF EXCHANGE, &c.—*Continued.*

to have been put in, in time to be delivered before the expiration of the day following the dishonor. *Ib.*

4. Where personal notice is required between parties residing in the same place, it is sufficient if it be made by the expiration of the day following the refusal. *Ib.*
5. Where the parties reside in different places, notice may be sent through the post office, to the nearest office of the party entitled to notice; and it is sufficient if it be put into the post office at any time during the day the note is payable. *Ib.*
6. The deposit of a letter in the post office, properly directed, and in proper time, is sufficient to charge the endorser without proof of its having been actually received, and a right of action accrues, without waiting for it to reach its destination. *Ib.*
7. The usages of banks have grown up to be a part of the settled law of the land, and in obedience thereto, personal notice is dispensed with, and the indorser is charged by the bare deposit of notice in the post-office, even if it never comes to hand. *Ib.*
8. This case is distinguished from the cases of *Flack vs. Green*, 3 *G. & J.*, 474, and *Smedes vs. The Utica Bank*, 20 *Johns.*, 372. *Ib.*
9. The testimony of the cashier, that he "sealed and directed the notices, both to the drawer and endorser, *at their respective post offices*," must be taken to mean, that he knew the residence of both to be out of the town, and directed accordingly through the proper channel, by which notice would reach them. *Ib.*
10. Whether due diligence has or has not been used, and whether or not legal notice has been given, are questions of law, to be decided by the court, unless the evidence is doubtful or contradictory. *Ib.*
11. The possession of the note by the appellees, previously endorsed by them, through the cashier, their agent, and produced by them as their cause of action, is *prima facie* evidence of property in them, and they are to be regarded as the *bona fide* owners, notwithstanding the subsequent endorsements, and entitled to sue upon it. *Ib.*
12. It is no objection that the endorsement is in blank. The act of 1825, ch. 35, dispenses with the form of filling up the blank, so far as to sustain the judgment upon any negotiable instrument, notwithstanding the omission to fill up the blank in the endorsement. *Ib.*

BILL OF RIGHTS.

*See* CONSTITUTIONAL LAW, 9, 10.

CASES EXPLAINED OR OVERRULED.

1. The case of *Achieson vs. Huddleson*, in this volume, p. 177, was reversed upon appeal, by the Supreme Court of the United States.
2. The case of *Owings vs. Owings*, 3 *Gill & John.*, 1, explained and confirmed. *Carroll vs. Bowie*, 34.
3. The case of *Dent vs. Dent*, 3 *Gill*, 482, is not in conflict with *Davis vs. Calvert*, 5 *G. & J.*, 269. *Mangum vs. Welling's Admr's*, 78.

CASES EXPLAINED, &c.—*Continued.*

4. The case of *Whitcomb vs. Whiting*, 2 *Doug.*, 652, adopted. *Ellicott vs. Nichols*, 86.
5. The case of *Ward vs. Howell*, 5 *H. & J.*, 60, does not decide any thing upon the subject of limitations. The remark of the court on that subject, is a *dictum*. *Ib.*
6. The cases of *Flack vs. Green*, 3 *G & J.*, 474, and *Smedes vs. The Utica Bank*, 20 *Johns.*, 372, are distinguished from this case. *Bell vs. The Hagerstown Bank*, 217.
7. The cases of *Brengle vs. McClellan*, 7 *G. & J.*, 434; *McElmoyle vs. Cohen*, 13 *Pet.*, 330; and *Cameron vs. Wurtz*, 4 *McCord*, 278, deciding, that the act of Congress of 1790, does not invest judgments of the States of the Union with a general extra-territorial operation, are not in conflict with the doctrines of this case. *Bank of the U. S., vs. Merchants Bank of Baltimore*, 416.
8. The case of *Ellicott vs. The U. S. Insurance Co.*, *ante*, 307, is distinguished from the case of *Albert and wife, vs. Winn and Ross*. *ante* 446, and is not in conflict with it, 447.

CERTIORARI.

*See* APPEAL, 5.

CHOSES IN ACTION.

*See* COURT OF CHANCERY, 13.

CIVIL ACTIONS.

1. Actions of debt instituted before a justice of the peace, for the recovery of the fines imposed by the act of 1846, ch. 109, are civil actions, and not criminal cases or prosecutions. *Day vs. The State*, 322.

CO-DEBTOR. *See* LIMITATION OF ACTIONS, 10.

CO-HABITATION.

*See* EVIDENCE, 16, 18.
PEDIGREE.

COMITY OF NATIONS.

1. The rule of comity is overruled by positive law. If the laws of this State and another State should differ, it cannot be made a question *here* which shall prevail. Where there is no constitutional barrier, our courts are bound to observe and enforce the statutory provisions of our own State. *Gardner vs. Lewis*, 378.
2. A nation will not suffer its own subjects to evade the operation of its own fundamental policy or laws, or to commit fraud, in violation of them, by any acts or contracts made, with that design, in a foreign country, and it will judge for itself how far it will adopt, or how far it will reject, any such acts or contracts. *Ib.*
3. *H* and *G*, citizens of *Maryland*, entered into an agreement in *Washington* city, *D. C.*, by which the former admitted an indebtedness to the latter, and agreed, that certain goods attached by the latter in *Norfolk, Va.*, should be the property of *G*, and directed an order to the officer, in whose custody said goods were, to deliver them to *G*; and also agreed, that certain notes then given by one *T*, in favor of *H*,

COMITY OF NATIONS.—*Continued.*

should be held by *G*, for so much of said debt as the *Norfolk* goods failed to pay. *G* afterwards removed these goods and notes to *Maryland*, and an action of *trover* was instituted against him by *L*, the trustee in insolvency of *H*, (who had in the meantime applied for the benefit of the insolvent laws of *Maryland*,) alleging, that this transaction was in fraud of the creditors of *H*. HELD, that the validity of this agreement must be determined by the laws of *Maryland*. *Ib*.

4. Where our statutes declare the deed of an insolvent fraudulent, although our courts cannot meddle with the property while without our territory, still *here*, it is regarded as part of the trust fund, and if it be brought into *Maryland*, they will entertain a suit for it, and in deciding such suit, will be governed by the statutes of *Maryland*, disregarding the *lex rei sitæ*. *Ib*.

*See* EVIDENCE, 24.

COMMISSIONERS OF LOTTERIES.

*See* CONSTITUTIONAL LAW, 8.

COMPACT. *See* CONSTITUTIONAL LAW, 1, 7.

CONCURRENT JURISDICTION.

*See* PRACTICE IN EQUITY, 2.

CONSTITUTIONAL LAW.

1. The orphans court of *Washington* county, in the *District of Columbia*, being created under a public statute of the *United States*, any judicial tribunal of *Maryland*, acting under the act of 1813, may judicially recognize the seal of the said court, without requiring any proof of its genuineness, or indentity, other than that afforded by the inspection thereof. *Mangum vs. Welling's Admr's*, 78.

2. The act of Assembly, passed the 10th of March 1843, imposing certain tolls upon passengers, in "any passenger or mail coach," passing over the *Cumberland* road, is no violation of the compact, between the *United States* and *Maryland*, under the acts of Congress, ceding to the latter, that portion of said road within her limits, and the act of this State, of 1831, ch. 85, and its supplements, accepting the same. (*This case was reversed upon appeal by the Supreme Court of the United States.*) *Achison vs. Huddleson*, 177.

3. A carriage whenever it is carrying the mail, must be held, to be laden with the property of the *United States*, within the true meaning of this compact, and consequently exempted from the payment of tolls. *Ib*.

4. But this exemption does not apply to any other property, conveyed in the same vehicle, nor to any person travelling in it, unless he is in the service of the *United States*, and passing along in pursuance of orders, from the proper authority. *Ib*.

5. The stipulation in behalf of the *United States*, is *limited* to carriages laden with the property of the government, and their necessary incidents, the horses by which they are drawn, and the driver who guides them. *Ib*.

CONSTITUTIONAL LAW.—*Continued*.

6. The tolls imposed by the act of the 10th of March 1843, are not to be regarded as imposed upon the coach, but upon the passengers. *Ib.*
7. This contract should not be expounded, by the rules applicable to grants between individuals, but in a liberal spirit, securing to the *United States* the full benefit of the exemption, and at the same time leaving the *State* in possession, of the means to accomplish the great object of the contract, viz., the preservation of the road. *Ib.*
8. The 2nd section of the act of 1847, ch. 284, compelling a party, against whom proceedings may have been instituted under the act of 1846, ch. 109, for the recovery of the fines imposed by the latter act, for insuring lottery tickets, or dealing in foreign lottery tickets, to answer on oath any bill of discovery which may be filed against him in the premises by the commissioners of lotteries, in the name of the State, is a constitutional enactment. *Day vs. The State*, 321.
9. The 3rd section of the bill of rights, furnishes no foundation for the novel proposition, that the whole common law, as then existing in *Maryland*, was made a part of the constitution, and that no part thereof could be abolished or changed by a mere act of legislation. *Ib.*
10. The 19th section of the bill of rights plainly shows, that the power was confided to the legislature, which has been exerted by it in the passage of the act of 1847, ch. 284. *Ib.*
11. Actions of debt, instituted before a justice of the peace, for the recovery of the fines imposed, by the act of 1846, ch. 109, are civil actions, and not criminal cases, or prosecutions, and therefore the act of 1847, ch. 284, is not in conflict, with the 5th article of the amendments, to the constitution of the *United States*. *Ib.*
12. The act of 1847, ch. 193, has no application to the importer, who is authorised to sell spirituous liquors in the form in which they were imported, without obtaining a license from the State of *Maryland*, by force of the constitution of the *United States*, as expounded in the case of *Brown vs. The State of Maryland*, 12 *Wheat.*, 419. *Bode vs. The State*, 326.
13. The right of the State to impose the limitations and prohibitions contained in the act of 1847, ch. 193, upon the class of persons intended to be embraced by it, cannot be doubted. *Ib.*
14. The principles deducible from the authorities in regard to the construction of the 1st sec. of the 4th article of the Constitution of the *United States*, and the act of Congress of 1790, are:
    1st. That if the judgment of the district court for the city and county of *Philadelphia*, pleaded in this case, would be regarded by the courts of *Pennsylvania*, as conclusive evidence of the existence of a debt due by the appellants to the appellee, it is so to be considered by the courts of this State.
    2nd. That the original cause of action was extinguished by the judgment of that court; and

CONSTITUTIONAL LAW.—*Continued.*

3rd. That an action of *assumpsit* cannot be maintained on the original demand. *Bank of the U. S. vs. Merchants Bank of Baltimore*, 416.

15. The cases of *Brengle vs. McClellan*, 7 *G. & J.*, 434; *McElmoyle vs. Cohen*, 13 *Pet.*, 330; and *Cameron vs. Wurtz*, 278, deciding that the act of Congress of 1790, does not invest judgments of the States of the Union with a general extra-territorial operation, are not in conflict with the doctrines of this case. *Ib.*

CONSTRUCTION OF ACTS AND STATUTES.

1. The act of 1806, ch. 90, sec. 11, has no application to the case of the death of the defendant in error. It relates only to deaths *after* rule argument laid. *Carroll vs. Bowie*, 34.
2. The act of 1815, ch. 149, sec. 6, declares, that in all appeals or writs of error, the same shall not abate by the death of either party, if the proper person necessary to be made party shall, at the first or second term succeeding the death, appear for the purpose of prosecuting or defending the same. *Ib.*
3. But it is not to be inferred, that the heir, &c., or other proper person to be made a party, if a defendant, may elect to suffer a cause to abate, and so deprive the other party of the fruits of his judgment. Such a construction of the act of 1815, would constructively repeal the act of 1806. *Ib.*
4. The acts of 1806, ch. 90, sec. 11, and 1845, ch. 149, sec. 6, should be construed together; the former is confined to cases of death after rule argument, which points to the third term of the court, while the latter designs to extend the death to all prior stages in the cause, if the party proper to be made accepts the privilege conferred by that act. *Ib.*
5. The object of the act of 1815, was to prevent the abatement of appeals in certain cases, and intended that the party interested in sustaining the judgment of the court below, should have the privilege of appearing to prosecute or defend here. *Ib.*
6. The act of 1815, is to be confined to such cases as did abate by the death of the party before that act was passed. *Ib.*
7. By the 7th sec. of the act of 1763, ch. 23, where any person is bound in a bond or obligation, which shall be unpaid by the principal debtor, and the money due be paid or tendered by the surety, the obligee shall assign such bond to the surety, and he may, by virtue of the assignment, have an action in his own name against the principal debtor, but this section gives no remedy against a co-surety. *Ib.*
8. Neither does the 9th section of that act, give any remedy to one co-surety against another. It does no more than to supersede the common law, and give to the assignee, as the holder of a bond of third parties, the right to sue in his own name, the principal debtor; not to affect pre-existing rules between co-sureties. *Ib.*
9. The act of 1829, ch 51, which authorises an assignee of a bond to sue in his own name, does not apply to the relation of co-sureties It was not intended any more than the act of 1763, to affect questions which depend upon principles of contribution. *Ib.*

CONSTRUCTION OF ACTS, &c.—*Continued.*

10. A memorandum filed in a cause, objecting to the competency of testimony, not signed by counsel, is not an exception within the act of 1832, ch. 302. *Sindall and wife, vs. Campbell et al.*, 66.
11. Under the act of 1813, ch. 165, executors and administrators, to whom letters are granted in the *District of Columbia*, may maintain actions, and recover claims, in *Maryland*, as if authorised by the courts of this State. *Mangun vs. Welling's adm'rs*, 78.
12. The 3rd sec. of the act of 1835, ch. 380, shows, that a defendant who has answered a bill for an injunction, may appeal from the granting or refusal to dissolve it upon motion, without waiting for the answers of his co-defendants. *Barnes, et al., vs. Dodge*, 109.
13. By the act of 1805, ch. 110, and its supplements, the whole administration of the property of the insolvent, beginning with the sale and ending in distribution, is devolved upon the county court through their trustee, and their judgment in all matters appertaining to it is conclusive; because these are the exclusive subjects of the special jurisdiction conferred by that act. *Carter and wife vs. Dennison*, 158.
14. The institution of a court of commissioners of insolvent debtors, by the act of 1816, ch. 221, and its supplements, was only designed to relieve the county court from the pressure of its increasing business, imposed by this extensive class of cases. It was but an ancillary tribunal, bound to report and return all its proceedings, and still subject, to *Baltimore* county court. *Ib.*
15. The object of the act of 1835, ch. 235, was to authorise *Baltimore* county court, *ex officio*, to require from the trustees of insolvents, who should "thereafter apply for the benefit of the insolvent laws," an annual report of the funds belonging to their trusts, with a view "to cause distribution to be made among the creditors." *Ib.*
16. The 1st sec. of the act of 1836, ch. 133, extended this power to cases "pending in said court," in which the trustees had not distributed the fund, giving to such trustees, in "*cases then pending*," and *limited to such*, the right to apply "to said court, or some court of equity," for an audit, and directions to distribute or invest the funds. *Ib.*
17. The true construction of the provision in the 2nd sec. of this latter act, "that the power of the court to appoint an auditor "in insolvent cases, shall be *concurrent with that of the court of equity*," is, that *Baltimore* county court shall have the power to appoint an auditor, in the investigation of insolvent cases, to the same *intent* that courts of equity appoint an auditor in the course of their equity jurisdiction. *Ib.*
18. But when the same section further confers, powers "*concurrent with the courts of equity in the distribution of the funds of insolvent debtors*," it assumes a power to exist which is not within the scope of chancery jurisdiction, and confers nothing, therefore, the provision is a nullity. *Ib.*
19. The act of Assembly, passed the 16th of March 1843, imposing certain tolls upon passengers, in "*any passenger or mail coach*," passing over the *Cumberland* road, is no violation of the compact between the

CONSTRUCTION OF ACTS, &c.—*Continued.*

*United States* and *Maryland*, under the acts of Congress ceding to the latter that portion of said road within her limits, and the act of this State of 1831, ch. 85, and its supplements accepting the same. (*The case of Achison vs. Huddleson*, 177, *in which this decision was made, was reversed upon appeal by the Supreme Court of the United States.*) *Achison vs. Huddleson*, 177.

20. The tolls imposed by the act of 10th of March 1843, are not to be regarded as imposed upon the coach, but upon the passengers. *Ib.*

21. The act of 1825, ch. 35, dispenses with the form of filling up the blank, so far as to sustain the judgment upon any negotiable instrument, notwithstanding the omission to fill up the blank in the endorsement. *Bell vs. The Hagerstown Bank*, 218.

22. An appeal will not lie from the judgment of a county court superseding a writ of *certiorari*, by which proceedings before magistrates, under the act of 1793, ch. 43, against a tenant holding over, were brought before said court. *Crockett vs. Parke*, 237.

23. The right of appeal, given by the 6th sec. of the act of 1785, ch. 87, is confined to judgments of the county court in civil suits, actions or prosecutions originating therein, and does not extend to its judgments, when acting as an appellate tribunal, or when exercising a *quasi* appellate jurisdiction. *Ib.*

24. The uniform judicial interpretation of this act, from its passage to the present time, has denied the right of appeal from judgments of county courts, on appeals from judgments of justices of the peace, rendered under the acts of Assembly for the speedy recovery of small debts, on motions for new trials, for the postponement or continuance of a cause, or any other matter resting exclusively in the sound discretion of the county court. *Ib.*

25. The act of 1801, ch. 74, sec. 10, does not absolve legal plaintiffs on the record from responsibility for costs of the suit. The security provided by that act is cumulative. *Selby et al., vs. Clayton*, 240.

26. When judgment is for the defendant, the costs are always adjudged against the legal plaintiff on the record, and the successful party may either proceed against him for costs, or against the *cestui que use*, as provided by the act of 1801, ch. 74. *Ib.*

27. In providing a summary mode for obtaining a decree, the legislature did not intend, by the act of 1833, ch. 181, to limit the general jurisdiction of the court of chancery, (from whose decrees, at all times, the right of appeal exists,) in cases of mortgages. *Williams vs. Williams*, 302.

28. The 2nd section of the act of 1847, ch. 284, compelling a party against whom proceedings may have been instituted under the act of 1846, ch. 109, for the recovery of the fines imposed by the latter act, for insuring lottery tickets, or dealing in foreign lottery tickets, to answer on oath any bill of discovery which may be filed against him in the premises by the commissioner of lotteries, in the name of the State, is a constitutional enactment. *Day vs. The State*, 321

CONSTRUCTION OF ACTS, &c.—*Continued*.

29. The act of 1847, ch. 193, prohibiting the sale of spirituous liquors on the Sabbath day, was intended to embrace only the licensed tavern keepers, and the licensed retailers of the liquors and cordials therein designated. *Bode vs. The State*, 336.

30. This act has no application to the importer, who is authorised to sell spirituous liquors in the form in which they were imported, without obtaining a license from the State of *Maryland*, by force of the Constitution of the *United States*, as expounded in the case of *Brown vs. The State of Maryland*, 12 *Wheat.*, 419. *Ib.*

31. To carry into effect the intention of the legislature in framing this statute, and to enable the courts of criminal jurisdiction to execute its provisions, it is necessary to incorporate into it, by interpretation, the terms, "licensed tavern keepers, and licensed retailers." *Ib.*

32. The act of 1834, making void conveyances made by applicants for the benefit of the insolvent laws, does not apply to any case where the creditor or security receiving such conveyance, shall appear not to have notice of the condition of insolvency of the debtor. *Gardner vs. Lewis*, 379.

33. The 5th sec. of the act of 1832, ch. 280, authorising a corporate body to appear to an attachment and contest the claim of the plaintiff, by "pleading or otherwise," clearly gives the right to plead the recovery of a judgment in another State for the same cause of action, as a special plea in bar. *The Bank of the U. S. vs. Merchants Bank of Baltimore*, 416.

34. The acts of 1812, ch. 77, and 1816, ch. 21, though avoiding many acts done by an insolvent, yet do not include in the number an actual payment of money, *bona fide* due by him. *Stewart vs. The Union Bank*, 439.

35. The act of 1833, ch. 224, authorising the county courts to extend the term of service of slaves for a term of years, in certain cases, and its supplement, the act of 1845, ch. 105, conferring the same power upon the several orphans courts of the State, give no jurisdiction, either to the county courts or the orphans courts, unless the master, mistress, or agent, resides in the county where the application is made. *Patterson vs. Crookshanks*, 211.

36. The object of these acts, which are to be construed together, was to give to each of these courts concurrent jurisdiction over the subject matter, when the parties claiming, or their agents, reside within the limits of the county. Any other construction would conflict with the whole judicial system of the State. *Ib.*

CONTRACT.

1. *W* sold *B* a slave, and received one hundred dollars on account of the purchase money. The slave was then sick and not delivered, but delivery was promised at a future day, and before it took place, though requested, the slave died. Held, that *B*, under the circumstances, was entitled to recover the money advanced by him; and that although it may have been after the contract of sale that the

CONTRACT.—*Continued.*

defendant promised to refund, yet such promise was not founded upon a *nude pact*. *Brooke, adm'r, vs. Waring*, 5.

2. If the stipulation to deliver at a future day, and in case of failure to refund, formed no part of the original contract, it was still a modification thereof, and as obligatory upon the parties as if originally entered into. *Ib.*

3. Under the original contract, the failure to deliver the negro, would have bound the vendor to pay whatever amount of damages resulted to the vendee by reason of such failure, and the substitution of a sum certain, as damages by agreement would not be without consideration. *Ib.*

4. An agreement set forth, "that *B* had on his farm, copper and other minerals, and is desirous to have the same properly explored and worked"—that "*P* is willing to undertake such exploration and working." *W*, "in consideration of one dollar paid to him by *P*, agrees to give *P* the power to make such exploration and works, as *P* may think proper for such purposes, and reduction and conversion of the minerals, and dispose of the same;" that *W* reserves to himself *one-fifteenth* part of all such minerals and metals, after the same shall have been rendered fit for smelting, free and clear of all expenses; that *P* shall commence on or before, &c. HELD, upon a bill filed by the assignee of *P*, for specific execution of the contract, that *P* was only bound to *explore* the mines, not to *work* them, and that he only stipulated to explore them on or before a given day, and therefore specific execution, for want of mutuality in the contract, could not be decreed. *Tyson vs. Watts*, 124.

5. *H*, who was in embarrassed circumstances, called a meeting of his creditors, with the approval of the appellant, one of them, for the purpose of asking an extension of credit. The appellant said he could not attend, but would send *J*, his clerk, to represent him in "the most favorable manner." At this meeting it was agreed, that nothing could be done without an inventory of *H's* property, and that he, (*H*,) should go to *Washington*, and other places where his goods were, to make out one, and *J* and the other creditors agreed, that in the *interim* (five days,) no legal proceedings should be instituted against him. HELD: That *J*, as his agent, was authorised to enter into this agreement for the appellant, and that it was a positive contract binding upon him, and founded in a sufficient consideration, both on the part of the debtor and the other creditors; and that an attachment issued by the appellant on the goods of *H*, in *Norfolk, Va.*, the day after this agreement was made, was in fraud thereof. *Gardner vs. Lewis*, 379.

6. When creditors assemble for such a purpose as above stated, there is a contract, *inter se*, necessarily implied, that each shall act in good faith and do nothing to frustrate the common object, a breach of which is a gross fraud. *Ib.*

CONTRACT.—*Continued.*

7. On the 11th of July 1840, *N O* leased to *E* and *G*, a granite quarry, called the *Fox Rock Quarry*, for six years, to commence 10th of November 1840. The lessees stipulated, to quarry and get out at least 40,000 cubic feet of stone, and to pay therefor one and-a-quarter cents per foot, amounting to $500, or to pay for that quantity annually, by quarterly instalments. Before the execution of this lease, on the 5th of July 1840, the lessor gave to the lessees a receipt, acknowledging that he had received from them $866, "to be returned them in granite stone to the amount of 69,300 feet, between the 10th of November 1840, and the 10th of November 1846, from my quarry, known by the name of *Fox Rock Quarry*." HELD:
   1. That the true interpretation of the agreement between the parties, requires these two papers to be taken together as one contract; they are to be construed with mutual reference to each other, and the amount mentioned in the receipt must be considered as advanced, on account of rents to accrue under the lease.
   2. The intent of the parties no doubt was, that these advances should be applied, chronologically, to the rents as they became due; but, upon proof that only a part had been so applied, and that the lessees had paid other moneys in liquidation of prior rents, it was HELD, that they were entitled to have such advances set off against rents accruing subsequent to the time when, by a chronological application, prior rents would have extinguished them. *Owings et al., use of Green vs. Emery and Gault*, 405.

*See* CONSTITUTIONAL LAW, 7.

CONTRIBUTION.

*See* PRINCIPAL AND SURETY, 1. 2, 6.
LIMITATION OF ACTIONS, 10.

CONVEYANCES.

*See* FRAUD AND FRAUDULENT CONVEYANCES.

CORPORATIONS.

*See* PLEAS AND PLEADINGS, 12.

COSTS. *See* PRACTICE, 12.

CO-SURETIES. *See* PRINCIPAL AND SURETY.

COURT OF CHANCERY.

1. A father died in 1810, leaving a widow and three children. He was owner of freehold and leasehold property. The widow received the rents and profits, educated the children, and, in 1816, married again, settling her portion of the estate upon herself for life, with remainder to the three children. In 1821, she settled her final administration account, and passed the leasehold titles to the children. In 1824, one of the daughters married, and, with her husband, continued to live with the mother, as before. In 1831, all the parties

COURT OF CHANCERY.—*Continued.*

interested united with one of the children, to sell a portion of his father's estate. He received the purchase money, and released his interest in the residue to his two sisters. The estate was worth about $200 per annum. In 1842, the married sister furnished an account, admitting in 1839, '40 and '41, the payment to her of sums of money monthly, accompanied with a letter from her, stating, that "in 1839, it was agreed, I should receive a part of the rent out of my father's estate." In that account, she claimed a small balance, and offered to pay her proportion of taxes. HELD, upon a bill filed in 1842, for a partition and sale, that under such circumstances, the widow and mother, with the consent and acquiescence of the children, received and distributed the rents of the property up to 1839; that she was not an intruder into, nor a voluntary trustee over the estate. *Sindall and wife vs. Campbell et al.*, 66.

2. That in such case the land being sold, and account of rents taken, the allowance to the widow, in lieu of dower out of her husband's freehold estate, was not to be postponed to the claim of the children for rents and profits. *Ib.*

3. That the letter written by the married sister to her mother, in 1842, must be presumed to be written as the agent of her husband, and with his approbation and consent. *Ib.*

4. Between 1832 and 1839, judgments were rendered against *B* and his sureties. In October 1839, the defendants, *B*, *T*, *P*, conveyed their property in trust, to sell and pay judgment and other creditors, according to their legal priorities. In 1840 and 1841, the trustees sold parcels of the estate to *D*, and the purchase money was applied by him in discharge of elder judgments, which were thereupon assigned to the purchaser: a full and fair value was paid for the land. In 1838, *L* and *C* obtained judgments against *B* and others, and, in 1844, revived the same, by *scire facias*, against *B* and his terre-tenants, of whom *D* was one. The judgment of *L* and *C* was *junior* to those paid off by *D*. The purchaser, when the *sci. fa.* issued, was a non-resident, and not returned summoned under that writ. The judgment being revived, *L* and *C* were proceeding to a sale of the land, under the lien of their judgment of 1838. It appearing that the amount of the judgments, prior to that of 1838, was more than the value of the whole estate, HELD, that an injunction obtained by *D*, should be continued until final hearing, unless *L* and *C* would bring into court the sum paid by *D*, in discharge of the senior judgments. *Barnes et al., vs. Dodge*, 109.

5. The defendants, *L* and *C*, not having assented to nor participated in the formation of the trust created by *B*, and *P* and *T*, nor having ratified the same, are not bound by its terms. *Ib.*

6. The complainant, *D*, had no defence at law. He could not have successfully pleaded to the *scire facias*. He could not have maintained payment, satisfaction, or release of the judgment of *L* and *C* at law, or that *B* was not seized at the rendition of the judgment. *Ib.*

COURT OF CHANCERY.—*Continued.*

7. But in equity, as no combination, fraud, or unfairness appeared in the purchase of the land—as it was sold for its full, utmost, value—as the whole purchase money had been applied by the purchaser, to the payment of the judgments *prior* in date, and *preferred* liens on the land, and as there *then* remained due on judgments a large amount against *B*, prior in point of date to the judgment of *L* and *C*, and as the payment of the judgment of *L* and *C* out of this land was beyond the reach of hope, the purchaser is entitled to relief by injunction, as against such revived judgment and execution thereon. *Ib.*
8. *H, senior*, devised to his widow one third of his personal estate, after the payment of debts and three legacies, amounting to $1800. *H, junior*, the executor, gave bond for the payment of debts and legacies. For the purpose of distribution two persons were chosen, by whom the entire personal estate of the deceased was appraised at $3306; and the executor paid his mother, in 1815, one-third, valued at $1102. In 1822, *H, junior*, gave his notes to his mother, for rent then due by him. These she assigned to the appellant. In 1836, the appellee filed his bill against the appellant, alleging, that the widow was overpaid by the executor, by inadvertence and mistake, $600 on her claim under the will; that the appellee also boarded and furnished her and her negroes. HELD: it was not to be presumed, that the widow claimed under the will of *H, senior*, but that she claimed and received, with the privity of the executor, what she might rightfully have claimed after rejecting the will, one-third of the personal property after payment of debts, and that both understood her true position. *Hutchins vs. Hope*, 119.
9. Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of equity. *Briesch vs. McCauley*, 190.
10. But a defence cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of the court, that the defence ought to have been sustained at law. *Ib.*
11. The allegation that the judgment was obtained by fraud, was denied by the answer, and not established by proof. The bill contained no allegation that the complainant was defeated at law by accident or surprise, nor does it aver that the proof he now offers upon the question there decided, came to his knowledge after the trial at law. HELD: that under such circumstances, a court of law would have refused to grant a new trial, and there is certainly no ground for the interposition of a court of equity. *Ib.*
12. The executor of *J M* filed a bill in equity, alleging, that a partnership had existed between his testator and the defendant *H*, and praying for an account of the partnership transactions, and that a certain fund in the hands of a trustee, to which *H* was entitled in right of his wife, the same being her distributive share of her de-

COURT OF CHANCERY.—*Continued.*

ceased father's real estate, might be enjoined and set apart for the payment of his claim. HELD: That the complainant had no lien, or claim in equity, on this fund, different from any other creditor of *H*, and that the injunction was rightly dissolved, and the bill properly dismissed. *Mann's Exc'r, vs. Higgins and Miller*, 266.

13. A court of equity will not aid even the husband, to reduce the *choses in action* of the wife, into possession, except upon terms which provide for the support of the wife and her children; much less, then, will it exert its power to effect the application of such *choses in action*, to the payment of the husband's creditors: and thus deprive the wife, surviving her husband, of the right given her at law, of being reinvested with all the *choses in action* not reduced into possession by the husband, during coverture. *Ib.*

14. Where there was a general impression in the community that the sale would be postponed, and this was known to the exceptant, it was his duty to communicate the fact to the trustees, and his failure to do so, would present an insuperable obstacle to the interposition of a court of equity, in his favor, to set aside the sale. *Johnson vs. Dorsey*, 269.

15. A sale regularly conducted, and fairly made under the authority of a court of chancery, where a third party, a stranger to the proceedings, becomes the purchaser, cannot be disturbed on the ground of *mistake*, unless such mistake has been caused by the conduct of the purchaser, or can be traced to the creditor, for whose use the property was sold, or to the trustee. *Ib.*

16. The land in this case sold for $12,422 25. HELD, that the court would not be authorised to vacate the sale upon the single ground of inadequacy of price, even assuming the property to be worth $20,000; the estimate placed upon it by the exceptant. *Ib.*

17. Inadequacy of price, standing by itself, is not sufficient to vacate a sale, unless it be so gross and inordinate, as to indicate some mistake or unfairness in the sale, for which the purchaser is responsible, or misconduct or fraud in the trustee. *Ib.*

18. Where the only object of a decree, appointing receivers and awarding an injunction, so far as disclosed upon its face, was to provide for the safe keeping of the effects of the defendant, and to prevent any fraudulent transfer thereof; and where such decree did not state that the ulterior intent of the court was, to make an equitable distribution of the funds, and contained no direction to the receivers, to give notice to creditors to file their claims, it was HELD: That this decree imposed no restrictions upon creditors in prosecuting their claims, either at law or in equity, and a judgment subsequently recovered by a creditor. is as much a lien on the real estate of the defendant, as if the appointment of receivers had never been made. *Ellicott vs. The U. S. Insurance Co.*, 307.

19. But in equity, this lien attaches only to such interest in the real estate, as the defendant had therein at the time the receivers were

COURT OF CHANCERY.—*Continued.*

appointed, and cannot be extended to the increased value of the property, resulting from payments of purchase money made thereon by the receivers. *Ib.*

20. No proceedings of the court requiring creditors to bring in their claims, for the purpose of receiving their distributive shares of the property of the defendant in the hands of the receivers, adopted *after* the rendition of the judgment, can operate retroactively to impair the validity of its lien. *Ib.*

21. A court of equity will not restrain a creditor from prosecuting his legal remedy against the personal representatives of his debtor, unless there is a decree under which the creditor has a present right to come in and prove his debt. *Ib.*

22. If the decree had stated the ulterior object of the court, in placing the effects of the defendant in the hands of receivers, to have been, that it might make an equitable distribution thereof amongst creditors, and had directed the receivers, to give the usual notice to creditors to file their claims, then any creditor who should institute or continue to prosecute a suit at law, to recover a judgment on his claim, would have been enjoined on application, and if no such application were made, the court would regard his judgment, if obtained, as an unwarrantable interference with the jurisdiction it had assumed, and reject it as a lien on the property, in the hands of the receivers. *Ib.*

23. A bill was filed by the appellee, against his guardian, and the sureties in his guardian's bond, for an account, in which it was stated, that one of the securities in said bond was solvent. HELD, that the party had remedy at law, and the bill was dismissed. *Lawson et al., vs. Davis.* 345.

24. The principle, that equity will consider that as done which ought to be done, is an established maxim; but the court, in order to be justified in regarding an act as done, must have jurisdiction of the case, and be able to insist that it shall be done. A mere parol agreement to execute a mortgage, is one of which a court of chancery can take no notice, and, of course, cannot regard it as performed. *Clabaugh and Landers vs. Byerly.* 354.

25. A bill was filed in chancery on the 14th of September 1846, by the creditors of *J*, alleging his insolvent condition, and that he designed to give an undue preference to certain of his creditors, especially *A and wife*. Upon this bill an injunction was granted, restraining *J* from giving, and *A and wife* from receiving, any such preference. On the 29th of the same month, *A and wife* filed a bill on the equity side of *Baltimore* county court, alleging *J's* indebtedness to them on account of his misapplication of certain trust funds belonging to the wife of *A*, and his promise to secure them by a conveyance of certain real estate, which he had failed to do, and praying that he might be decreed to pay them the sum thus due under the trust. *J* answered this bill, admitting its averments,

COURT OF CHANCERY.—*Continued*

and on the 31st of October a decree was passed by *Baltimore* county court, directing *J* to bring into court the amount ascertained and admitted to be due to the complainants. HELD: That the original bill of the 14th of September, drew to the court of chancery the whole litigation in regard to the distribution of *J's* estate; that the proceedings of *A and wife*, in *Baltimore* county court, were in violation of the chancellor's injunction, and that it was competent for the court of chancery to restrain, by injunction, the execution of this decree, and treat the whole proceeding in said county court as a nullity. *Albert and Wife, vs. Winn and Ross*, 446.

26. The appropriate remedy for *A and wife* was, in chancery, on the original bill, that court having ample power to afford them the relief which they sought in another form, in another court of concurrent jurisdiction. *Ib.*

27. A lien upon certain real estate was given by a mortgage, to secure the payment of a sum of money to be ascertained by the award, of two persons to be chosen by the parties to the deed, with power to said persons, in case they disagreed, to chose an umpire. And the said referees, taking the *data* stated in the mortgage as their rule or guide, were to make out their award and return the same to the parties in writing, within thirty days after their appointment. HELD: That this mortgage was a security and lien for the amount of an award to be thus made, and for nothing more, and the award having failed, by reason of misconduct in the arbitrators, the mortgagees can have no relief in equity upon a bill for the sale of the mortgaged property, and the specific execution of this contract. *Emery et al., vs. Owings*, 488.

28. The parties having themselves stipulated the mode by which the amount, to be a lien on the lands, should be ascertained, a court of equity has no jurisdiction to compel the parties to adopt any other mode. *Ib.*

*See* PRACTICE IN EQUITY, 2.

CREDITORS. *See* CONTRACT, 5, 6.

CUMBERLAND ROAD.

*See* CONSTITUTIONAL LAW, 3.

CURTESY, TENANT BY,

*See* WILL AND TESTAMENT, 4.

DEBT ACTION OF.

*See* CIVIL ACTIONS.

DEBTOR AND CREDITOR.

*See* PARTNERSHIP, &c., 9.

COURT OF CHANCERY, 18 to 23.

DECREE.

1. A decree of this court remanding a cause, with directions for further proceedings is, as to all questions decided by it, conclusive and obligatory upon this court as well as the court below, and no error

DECREE.—*Continued.*

can be imputed to the county court in its subsequent proceedings conforming thereto, when such proceedings are reviewed on a second appeal to this court. *Mong vs. Bell*, 244.

DEEDS.

*See* FRAUD AND FRAUDULENT CONVEYANCES.

DELIVERY. *See* CONTRACT, 1, 2, 3.

DELUSION.

*See* INSANITY.

DISCOVERY BILL OF.

*See* CONSTITUTIONAL LAW, 8.

DOWER.

*See* COURT OF CHANCERY, 2.

DUE DILIGENCE.

*See* BILLS OF EXCHANGE, &c., 11

DURESS. *See* FRAUD, &c., 4.

EVIDENCE.

1. Certain negroes owned by *S*, remained in his possession until 1832, when they were sent to the farm of his daughter. They continued there until 1845, when they were replevied by the executor of *S*, from *G*. The defendant, *G*, proved, that *S*, in 1841 or 1842, said, he had given nearly all his negroes to his sons and daughter. The plaintiff then proposed to prove the declarations of the daughter, then sole, that her father had said, he would give her one-third of every thing on his farm, *except negroes*, and would loan her one-third of them during his life, and, after his death, would give her one-half of them. HELD, as the defendant relied on the daughter's right of property to maintain his pleas, the declarations made by her, about the time she obtained the slaves, as to the nature and character of her possession, may be used to rebut the evidence offered by the defendant to prove property in her, though her right of property would not be affected by any decision in this case. *Garner vs. Smith's Ex'rs*, 1.
2. A witness, the neighbor of a deceased testator, had known him well for twenty-five years, often had dealings with him, and would never have hesitated to buy from, or sell to him, land or negroes for any amount, may prove, that, in his opinion, the testator was of sound and disposing mind and capable of executing a valid deed or contract, during all the period of the witness's acquaintance with him. *Brooke et al., vs. Townshend*, 10.
3. The mere naked opinions of other persons, than the subscribing witnesses to a will, not occupying the position of medical men, are inadmissible in reference to the mental capacity of a testator, whose will may be controverted. *Ib.*
4. The impressions made upon the mind of a witness, by the conduct, manner, bearing, conversation, appearance, and acts of a testator, in various business transactions, is not mere opinion; it is *knowledge*, and strictly analogous to the cases of personal identity and handwriting. *Ib.*

EVIDENCE.—*Continued.*

5. In an action of debt, against a surviving partner, he pleaded a release. The plaintiff rejoined, that it was obtained by misrepresentation and fraud; that the defendant had represented, the partnership was not able to pay, and could not pay, more than about one-fourth of the debt, when, in fact, it was possessed of sufficient property to pay the whole claim, which the defendant well knew, and that in consequence of the said false and fraudulent representation, the plaintiffs executed the release. The plaintiffs gave general evidence of the condition of the partnership affairs, as represented by the defendant to them, the alleged insolvency of the firm, prior to and at the time of the release, and that the firm continued until death of the other partner. The deceased partner, on being informed, prior to his death, of the settlement with the plaintiffs at one-third of their claim, said, that the firm had, at the time of said alleged settlement, funds sufficient to have paid the plaintiffs in full, in the hands of the defendant, as liquidating partner. HELD, that this declaration of the deceased partner, was evidence to affect the defendant as his survivor. *Doremus, et al., vs. McCormick*, 49.
6. Under the act of 1813, ch. 165, executors and administrators, to whom letters are granted in the *District of Columbia*, may maintain actions, and recover claims, in *Maryland*, as if authorised by the courts of this State. *Mangun vs. Welling's adm'rs*, 78.
7. Copies of their letters testamentary, or of administration, under the seal of the authority granting the same, are sufficient evidence to prove the grant thereof. *Ib.*
8. Declarations of one of the administrators of an intestate, made after his decease, but before the grant of letters of administration, are not evidence against the intestate's estate; and the fact that such administrator is interested in the distribution of the estate, does not make any difference in the application of the above rule. *Ib.*
9. It is an established principle of evidence, that the answer of one defendant cannot be read in evidence against his co-defendant. *Briesch vs. Mc Cauley*, 190.
10. A draft was regularly protested for non-payment, in *Georgetown, D. C.*, and the usual notices to the drawer and endorsers, deposited in the P. O, the same evening, by the *notary*, directed, under cover, to *B*, the cashier of the appellee in *Hagerstown*. It was then proved by B, that he had a distinct recollection of receiving these notices, and is sure that, on the same day, he sealed and directed them to the drawer and endorsers, at their respective post offices. He does not recollect the exact time of their receipt, but remembers no instance where such notices were not received in due time, *i. e.*, on the second day after their date, and should have remembered an instance of longer delay as unusual. That the bank has a regularly appointed messenger, whose duty and practice it is to come to the bank daily, about the hour of closing, when he either delivers to him all letters and notices for the P. O., or when he leaves before the messenger arrives, places such letters

EVIDENCE.—*Continued.*

carefully on his table, and there is a general understanding that the messenger is to take them. He cannot say which course was adopted in this instance, but did not find the notices on his table next morning, and has never so found them. By the *teller* of the bank, that it is his practice, when the cashier leaves before the messenger arrives, to see that the letters are taken by the latter,—is very particular in this respect, and recollects no instance where they were not taken the same day. By the *messenger*, that it was a part of his duty and his invariable custom, to be at the bank at the hour of closing, or very soon after, to take the letters and notices to the P. O. He either receives them from the cashier in person, or, if he has left, takes them from his table. Has never failed to obtain them, and it has been his uniform custom to deposit them directly in the P. O., which he has never failed to do, except in one instance particularly described. HELD: That this evidence of notice of non-payment to the indorser, was legally sufficient to charge him, and to warrant an instruction to the jury that if they believed it, they must find for the plaintiff. *Bell vs. The Hagerstown Bank*, 216.

11. The deposit of a letter in the post office, properly directed, and in proper time, is sufficient to charge the endorser without proof of its having been actually received, and a right of action accrues, without waiting for it to reach its destination. *Ib.*

12. The testimony of the cashier, that he "sealed and directed the notices, both to the drawer and endorser, *at their respective post offices*," must be taken to mean, that he knew the residence of both to be out of the town, and directed accordingly through the proper channel, by which notice would reach them. *Ib.*

13. Whether due diligence has or has not been used, and whether or not legal notice has been given, are questions of law, to be decided by the court, unless the evidence is doubtful or contradictory. *Ib.*

14. The possession of the note by the appellees, previously endorsed by them, through the cashier, their agent, and produced by them as their cause of action, is *prima facie* evidence of property in them, and they are to be regarded as the *bona fide* owners, notwithstanding the subsequent endorsements, and entitled to sue upon it. *Ib.*

15. A party, who is a legal plaintiff on the record, and as such responsible for the costs of the suit, is an incompetent witness in the cause, upon the ground of interest. *Selby, et al., vs. Clayton*, 240.

16. In cases of pedigree, the declarations of a deceased person, and of the deceased members of the family, are admissible to prove *per se*, not only the issue, but the marriage, and the rule of evidence admitting such declaration, is not subject to the qualification, that cohabitation must be first shown to raise the inference of marriage. *Cope's, ad'mr, vs. Pearce*, 247.

17. It is upon the ground of necessity that these declarations are admitted, as an exception to the general rule excluding hearsay evidence,

EVIDENCE.——*Continued.*

cases of pedigree being often incapable of proof, and depending entirely upon reputation. *Ib.*

18. Cohabitation *alone*, proved between parties, as man and wife, is sufficient to raise the presumption of legal marriage, when the parties have been long dead, and any declarations made by them, as to their being or not being married, may be used to strengthen or weaken this presumption. *Ib.*

19. A duly authenticated copy of a guardian's account, passed by the orphans court, is *prima facie* evidence to prove, that at the date of such account, the wards, in whose favor it was stated, were minors, and that the accountant was their guardian, and as such, owed them the amount therein stated to be due them. *Richards and wife, vs. Swan, et al.*, 366.

20. A guardian passed his account in the orphans court on the 27th of June 1843, admitting therein a large indebtedness to his wards. And on the 15th of July 1844, executed a deed and bill of sale, conveying certain real and personal estate to his daughter. Upon proceedings by the wards to vacate these deeds, as fraudulent as against them and other creditors, it was HELD: That the admissions in this account were evidence against the grantee in said deeds, though similar admissions in the answer of the guardian, might not be evidence against the said grantee, his co-defendant. *Ib.*

21. Admissions of facts, made at a time when they were not in dispute, by a person having then no interest to make false admissions, and making them to charge himself, are evidence against him, and those claiming under him by title, subsequent to such admissions. *Ib.*

22. Reports of adjudged cases, are not evidence of what is the law of the State or country in which they are pronounced. The written law of foreign countries should be proved by the law itself, as written, and the common customary or unwritten law, by *witnesses acquainted with the law*. *Gardner vs. Lewis*, 377.

23. A legal plaintiff on the record is not a competent witness, even though the party, for whose use the suit is brought, offers to deposit in court any sum which the court may direct, to cover the liability of such plantiff for costs. *Owings, et al., use of Green, vs. Emery & Gault*, 405.

24. It is an acknowledged and fixed principle of universal obligation, resulting from the comity, and respect due from one judicial tribunal to another, that a judgment of a court of record of a sister State, is in itself *prima facie* evidence of jurisdiction. *Bank of the U. S. vs. Merchants Bank of Baltimore*, 416.

*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

EXECUTORS AND ADMINISTRATORS.

1. The trust confided to an executor, is defined by his letters testamentary, which is the commission under which he acts. *Gibbons, Exc'r of Riley vs. Riley*,

EXECUTORS, &c.—*Continued.*

2. The acts of Assembly prescribe the mode in detail, in which this trust is to be performed. *Ib.*
3. An admission in an answer, that two persons jointly purchased a slave, does not prove they were joint tenants. The presumption is, that each paid one-half of the purchase money, and in such a case, where one of the purchasers dies, the other is not entitled to the whole by survivorship, but the executor of the deceased must account for the moiety of his testator, as of other portions of his personal estate. *Ib.*

*See* EVIDENCE, 6, 8,

FINES AND PENALTIES.

*See* CONSTITUTIONAL LAW, 8, 11.

FOREIGN JUDGMENTS.

*See* PLEAS AND PLEADING, 10, 11, 12.

FRAUD.

*See* MORTGAGE, &c., 15.
PARTNERSHIP, &c., 2, 3, 4.
FRAUD AND FRAUDULENT CONVEYANCES.

FRAUD—FRAUDULENT CONVEYANCES.

1. There is no ascertained rule of law which fixes and determines, what acts or declarations of a party shall, in all cases, be requisite to establish fraud. Each case must depend upon its own circumstances. *Richards and wife, vs. Swan, et al.*, 367.
2. The conveyances in this case were vacated, upon proof that they embraced all the grantor's property, real and personal, were made to his daughter, who never did and never could have paid the considerations expressed in them; that at the time of executing them, the grantor was greatly in debt, and shortly afterwards applied for the benefit of the insolvent laws, returning no property in his schedule; and that the whole transaction was a scheme to defraud creditors. *Ib.*
3. *H* and *G*, citizens of *Maryland*, entered into an agreement in *Washington* city, *D. C.*, by which the former admitted an indebtedness to the latter, and agreed, that certain goods attached by the latter in *Norfolk, Va.*, should be the property of *G*, and directed an order to the officer, in whose custody said goods were, to deliver them to *G;* and also agreed, that certain notes then given by one *T*, in favor of *H*, should be held by *G*, for so much of said debt as the *Norfolk* goods failed to pay. *G* afterwards removed these goods and notes to *Maryland*, and an action of *trover* was instituted against him by *L*, the trustee in insolvency of *H*, (who had in the meantime applied for the benefit of the insolvent laws of *Maryland*,) alleging, that this transaction was in fraud of the creditors of *H*. HELD, that the validity of this agreement must be determined by the laws of *Maryland*. *Gardner vs. Lewis*, 378.
4. Fraud and extortion in procuring a written agreement, if established, whether it be technically duress or not, will invalidate the instrument. *Ib.*

FRAUD, &c.—*Continued.*

5. If an insolvent could himself successfully impeach an agreement transferring property, for fraud, the property remains in him, and is transferred to his trustee, who then acquires a right to sue for it, and even if the insolvent could not sue for it, being *particeps criminis*, yet the trustee may. *Ib.*
6. Whether a deed be fraudulently obtained from an insolvent, or be the result of fraud practised upon him, if thereby his creditors are defrauded, the trustee is the person to claim the property in their behalf. *Ib.*
7. *H*, who was in embarrassed circumstances, called a meeting of his creditors, with the approval of the appellant, one of them, for the purpose of asking an extension of credit. The appellant said he could not attend, but would send *J*, his clerk, to represent him in "the most favorable manner." At this meeting it was agreed, that nothing could be done without an inventory of *H's* property, and that he (*H*,) should go to *Washington*, and other places, where his goods were, to make out one, and *J* and the other creditors agreed, that in the *interim* (five days,) no legal proceedings should be instituted against him. HELD: That *J*, as his agent, was authorised to enter into this agreement for the appellant, and that it was a positive contract binding upon him, and founded in a sufficient consideration, both on the part of the debtor and the other creditors, and that an attachment issued by the appellant on the goods of *H*, in *Norfolk*, *Va.*, the day after this agreement was made, was in fraud thereof. *Ib.*
8. When creditors assemble for such a purpose as above stated, there is a contract, *inter se*, necessarily implied, that each shall act in good faith and do nothing to frustrate the common object, a breach of which is a gross fraud. *Ib.*
9. The county court instructed the jury, that if they found that the debtor intended to transfer his property to a creditor by a certain agreement, and at the time of such agreement, he had no reasonable expectation of being exempt from liability or execution for or on account of his debts, without applying for the benefit of the insolvent laws, and that the creditor at the time had notice of the debtor's condition of insolvency, then such transfer was made under a view and intent of becoming an insolvent debtor, with intent thereby to give an undue and improper preference to such creditor, and vested in him no title to the property. HELD, that this instruction was properly granted. *Ib.*
10. Prior to the act of 1834, ch. 293, payments *eo nomine*, by an insolvent debtor, no matter what his views or expectations might be, were not declared to be fraudulent or void. *Stewart vs. The Union Bank*, 439.
11. In this case it was HELD, that the payment of a debt, in June 1832, by parties at that time in failing circumstances, and who, in October of the same year, applied for the benefit of the insolvent laws, was not void under the insolvent system as it then existed. *Ib.*
12. In this case the court decided, that a deed conveying all the grantor's property to certain trustees, in *trust*: 1st. To defray the expenses

FRAUD, &c.—*Continued.*

attending the execution of the trust. 2nd. To the payment of the several creditors named in the schedule annexed to the deed. 3rd. To the payment of the claims of such creditors as shall, on or before a given day, execute and deliver to the trustees full and absolute releases and acquittances of such claims; and 4th. If any surplus shall remain, to apply the same to the satisfaction of the claims of all other creditors of the grantor, without distinction or priority, was fraudulent and void, both at common law, and under the statute of the 13*th of Elizabeth*. *Albert and Wife, vs. Winn and Ross*, 447—*But see note at the end of the case*, 487.

13. Upon review of all the authorities, it was the opinion of the court in that case, that a deed which does not fairly devote the property of the debtor, in desperate circumstances, to the payment of his creditors, but prescribes to them the terms upon which they shall receive part payment, is, in law, fraudulent and void. *Ib.*
14. Where a conveyance is good in part and bad in part, as against the provision of a statute, it is void *in toto*, although there be no fraud intended. *Ib.*

*See* MORTGAGE, &c., 1, 5.
PREFERENCE DEEDS,
PARTNERSHIP, &c., 2, 3, 4.
GUARDIAN AND WARD, 2.

GUARDIAN AND WARD.

1. A duly authenticated copy of a guardian's account, passed by the orphans court, is *prima facie* evidence to prove, that at the date of such account, the wards, in whose favor it was stated, were minors, and that the accountant was their guardian, and as such, owed them the amount therein stated to be due them. *Richard's and wife, vs. Swan, et al.*, 366.
2. A guardian passed his account in the orphans court on the 27th of June 1843, admitting therein a large indebtedness to his wards. And on the 15th of July 1844, executed a deed and bill of sale, conveying certain real and personal estate to his daughter. Upon proceedings by the wards to vacate these deeds, as fraudulent as against them and other creditors, it was HELD: That the admission in this account were evidence against the grantee in said deeds, though similar admissions in the answer of the guardian, might not be evidence against the said grantee, his co-defendant. *Ib.*
3. Where a guardian has been removed by order of the orphans court, the ward may, during his minority, come into court by his next friend, and call such guardian to account. *Ib.*
4. Where the *prochein ami* of an infant dies during the prosecution of the suit, the court will appoint another. *Ib.*

HUSBAND AND WIFE.

*See* COURT OF CHANCERY, 13.

INADEQUACY OF PRICE.

1. The land, in this case, was sold at trustees sale for $12,422.25. HELD, that the court would not be authorised to vacate the sale upon the single ground of inadequacy of price. Even assuming the property to be worth $20,000, the estimate placed upon it by the exceptant. *Johnson vs. Dorsey*, 269.
2. Inadequacy of price, standing by itself, is not sufficient to vacate a sale, unless it be so gross and inordinate, as to indicate some mistake or unfairness in the sale, for which the purchaser is responsible, or misconduct or fraud in the trustee. *Ib.*

*See* SALES BY TRUSTEES.

INDICTMENT.

1. An indictment founded upon the act of 1847, ch. 193, will be defective, unless it describe the party accused, as a licensed tavern keeper or a licensed retailer of spirituous liquors, they being the class of persons, upon whom alone, the provisions of the act were designed to operate. *Bode vs. The State*, 327.
2. Where a statute contains an exception, so incorporated with its enacting clause that the one cannot be read without the other, the rule of pleading is, that the indictment must negative the exception; but where, after general words of prohibition, an exception is created in a subsequent clause or section, it must be interposed by the accused as a matter of defence. *Ib.*
3. But this rule has no application to an indictment under the act of 1847. That act, by its true construction, being confined and limited, in its character and prohibitions, to a designated class, there are no exceptions to be negatived, or to be pleaded by the accused, as a matter of defence. *Ib.*
4. The provisions of this act, with respect to the forfeiture of the license of the party convicted a second time for the same offence, clearly establishes the necessity of incorporating into the indictment a description of the party charged. *Ib.*

INFANT. *See* GUARDIAN AND WARD.

INJUNCTION.

1. Injunction causes upon motions to dissolve, are usually heard on bill and answer. Allegations in the answer, not responsive to the bill, without proof, do not affect the injunction. *Hutchins vs. Hope*, 119.

*See* COURT OF CHANCERY, 4, 7.
PRACTICE IN EQUITY, 4, 9,

INSANITY.

1. It is an error to suppose, that the maxim, "once insane, is presumed always to be insane," is unqualified in its character, or of universal application. *Brooke et al., vs. Townshend*, 10.
2. A continuing insanity is never to be presumed, where the malady or delusion under which the testator labored, was, in its nature, accidental and temporary. *Ib.*

INSANITY.—*Continued.*

3. Where there is proof of general rationality, and also of delusion, in a testator, it would be an encroachment on the rights of the jury for the court to assume, that the delusion under which the testator labored, was habitual, and therefore put the onus of proof, that he was free of such delusion at the execution of his will, on the caveatees. *Ib.*
4. The character of the delusion under which a party labors, as whether temporary or habitual, is within the exclusive province of the jury. *Ib.*
5. Where there is testimony in a cause conducing to prove, that a will was the direct consequence of the delusion under which the testator labored; a delusion calculated to pervert his judgment with respect to the disposition of his estate, it is perfectly clear, that he could not be considered as possessing a testamentary capacity, although, upon other subjects, he may have been rational and sane. *Ib.*

INSOLVENT DEBTOR.

1. By the act of 1805, ch. 110, and its supplements, the whole administration of the property of the insolvent, beginning with the sale and ending in distribution, is devolved upon the county court through their trustee, and their judgment in all matters appertaining to it is conclusive; because these are the exclusive subjects of the special jurisdiction conferred by that act. *Carter and wife, vs. Dennison*, 158.
2. *H* and *G*, citizens of *Maryland*, entered into an agreement in *Washington* city, *D. C.*, by which the former admitted an indebtedness to the latter, and agreed that certain goods attached by the latter in *Norfolk, Va.*, should be the property of *G.*, and directed an order to the officer in whose custody said goods were, to deliver them to *G.*, and also agreed that certain notes then given by one *T.*, in favor of *H.*, should be held by *G.*, for so much of said debt, as the *Norfolk* goods failed to pay. *G.* afterwards removed these goods to *Maryland*, where an action of trover was instituted against him, by *L.*, the trustee in insolvency of *H.*, (who had in the meantime applied for the benefit of the insolvent laws of *Maryland*,) alleging that this transaction was in fraud of the creditors of *H.* HELD: that the validity of this agreement, must be determined by the laws of *Maryland*. *Gardner vs. Lewis*, 378.
3. If an insolvent could himself, successfully impeach an agreement, transferring property, for fraud, the property remains in him, and is transferred to his trustee, who then acquires a right to sue for it, and even if the insolvent could not sue for it, being *particeps criminis*, yet the trustee may. *Ib.*
4. Whether a deed be fraudulently obtained from an insolvent, or be the result of fraud practised upon him, if thereby his creditors are defrauded, the trustee is the person to claim the property in their behalf. *Ib.*
5. By our laws, all the property of an insolvent, wherever situated, is conveyed to the trustee, and though other States may not so declare

INSOLVENT DEBTOR.—*Continued.*

in regard to property for which the trustee brings suit in their courts, yet, if the property be brought back to *Maryland*, our courts will regard it as part of the trust fund, to which the trustee is entitled. *Ib*

6. Where our statutes declare the deed of an insolvent fraudulent, although our courts cannot meddle with the property while without our territory, still *here*, it is regarded as part of the trust fund, and if it be brought into *Maryland*, they will entertain a suit for it, and in deciding such suit, will be governed by the statutes of *Maryland*, disregarding the *lex rei sitæ*. *Ib.*

7. It is not necessary for the trustee, in order to recover in *trover* goods fraudulently obtained from the insolvent, to pay or tender to the defendant the money he paid to the insolvent at the time when the fraudulent agreement was entered into, and as a consideration therefor. *Ib.*

8. The act of 1834, making void conveyances made by applicants for the benefit of the insolvent laws, does not apply to any case where the creditor or security receiving such conveyance, shall appear not to have notice of the condition of insolvency of the debtor. *Ib.*

9. The county court instructed the jury, that if they found, that the debtor intended to transfer his property to a creditor by a certain agreement, and at the time of such agreement, he had no reasonable expectation of being exempt from liability or execution, for or on account of his debts, without applying for the benefit of the insolvent laws, and that the creditor at the time, had notice of the debtor's condition of insolvency, then such transfer was made under a view and intent of becoming an insolvent debtor, with intent thereby to give an undue and improper preference to such creditor, and vested in him no title to the property. HELD, that this instruction was properly granted. *Ib.*

10. It is for the legislature and not for the courts to judge, what shall be, at any particular period, the policy of the insolvent system. The business of courts is faithfully to interpret the laws, without any regard to the private notions of the judges touching the policy of this or that provision. *Stewart vs. Union Bank*, 439.

11. Prior to the act of 1834, ch. 293, payments *eo nomine* by an insolvent debtor, no matter what his views or expectations might be, were not declared to be fraudulent or void. *Ib.*

12. The acts of 1812, ch. 77, and 1816, ch. 21, though avoiding many acts done by an insolvent, yet do not include in the number an actual payment of money, *bona fide* due by him. *Ib.*

13. In this case it was HELD, that the payment of a debt by parties, at that time in failing circumstances, and who in October of the same year, applied for the benefit of the insolvent laws, was not void under the insolvent system as it there existed. *Ib.*

INTEREST.

*See* PRACTICE, 7.

JOINT DEBTORS.

*See* LIMITATION OF ACTIONS, 7, 8, 9.

JOINT TENANTS.

1. The admission in an answer that two persons purchased a slave, does not prove they were joint tenants. The presumption is, that each paid one-half of the purchase money, and were tenants in common. *Gibbons, ex'cr of Riley, vs. Riley*, 81.
2. In such a case, where one of the purchasers dies, the other is not entitled to the whole by survivorship, but the executor of the deceased, must account for the moiety of his testator, as of other portions of his personal estate. *Ib.*

JUDGMENT AT LAW.

1. Where the only object of a decree, appointing receivers and awarding an injunction, so far as disclosed upon its face, was to provide for the safe keeping of the effects of the defendant, and to prevent any fraudulent transfer thereof; and where such decree did not state that the ulterior intent of the court was, to make an equitable distribution of the funds, and contained no direction to the receivers, to give notice to creditors to file their claims, it was HELD: That this decree imposed no restrictions upon creditors in prosecuting their claims, either at law or in equity, and a judgment subsequently recovered by a creditor, is as much a lien on the real estate of the defendant, as if the appointment of receivers had never been made. *Ellicott vs. The U. S. Insurance Co.*, 307.
2. No proceedings of the court requiring creditors to bring in their claims, for the purpose of receiving their distributive shares of the property of the defendant in the hands of the receivers, adopted *after* the rendition of the judgment, can operate retroactively to impair the validity of its lien. *Ib.*
3. A court of equity will not restrain a creditor from prosecuting his legal remedy against the personal representatives of his debtor, unless there is a decree under which the creditor has a present right to come in and prove his debt. *Ib.*
4. If the decree had stated the ulterior object of the court, in placing the effects of the defendant in the hands of receivers, to have been, that it might make an equitable distribution thereof amongst creditors, and had directed the receivers, to give the usual notice to creditors to file their claims, then any creditor who should institute or continue to prosecute a suit at law, to recover a judgment on his claim, would have been enjoined on application, and if no such application were made, the court would regard his judgment, if obtained, as an unwarrantable interference with the jurisdiction it had assumed, and reject it as a lien on the property, in the hands of the receivers. *Ib.*

*See* COURT OF CHANCERY, 4, 7.
PRACTICE IN EQUITY, 9, 12.
LIEN.

JUDGMENTS OF OTHER STATES.

*See* CONSTITUTIONAL LAW, 14, 15.

JURISDICTION.

1. A bill was filed in chancery on the 14th of September 1846, by the creditors of *J*, alleging his insolvent condition, and that he designed to give an undue preference to certain of his creditors, especially *A and wife*. Upon this bill an injunction was granted, restraining *J* from giving, and *A and wife* from receiving, any such preference. On the 29th of the same month, *A and wife* filed a bill on the equity side of *Baltimore* county court, alleging *J's* indebtedness to them on account of his misapplication of certain trust funds belonging to the wife of *A*, and his promise to secure them by a conveyance of certain real estate, which he had failed to do, and praying that he might be decreed to pay them the sum thus due under the trust. *J* answered this bill, admitting its averments, and on the 31st of October, a decree was passed by *Baltimore* county court, directing *J.* to bring into court the amount ascertained and admitted to be due to the complainants. HELD: That the original bill of the 14th of September, drew to the court of chancery the whole litigation in regard to the distribution of *J's* estate; that the proceedings of *A and wife*, in *Baltimore* county court, were in violation of the chancellor's injunction, and that it was competent for the court of chancery to restrain, by injunction, the execution of this decree, and treat the whole proceeding in said county court as a nullity. *Albert and wife, vs. Winn and Ross*, 447.
2. The appropriate remedy for *A and wife* was, in chancery, on the original bill, that court having ample power to afford them the relief which they sought in another form, in another court of concurrent jurisdiction. *Ib.*
3. The case of *Ellicott vs. The U. S. Insurance Co., ante*, 307, is distinguished from this case, and is not in conflict with it. *Ib.*

*See* PLEAS AND PLEADINGS, 9, 10.
COURT OF CHANCERY, 22.

LACHES. *See* LAPSE OF TIME, 3.

LAPSE OF TIME.

1. Long acquiescence and lapse of time in obedience to the statute of limitations, is a bar to a bill for an account. *Sindall and wife, vs. Campbell et al.*, 66.
2. After a lapse of twenty years, it is too late to open a settlement of accounts, upon the ground of inadvertency, when both parties knew their rights. *Hutchins vs. Hope*, 119.
3. Where a subsequent mortgagee knew of the existence of a prior mortgage at the time his own was executed, in September 1842, but made no complaint until February 1844, it was HELD, that by such a delay, he had lost his equity, if any ever existed, in his favor. *Clabaugh and Saunders vs. Byerly*, 354.

*See* LIMITATION OF ACTIONS.

LEGISLATURE.

*See* CONSTRUCTION OF ACTS AND STATUTES.

LEASE—LESSOR—LESSEE. *See* CONTRACT, 7.

LEX REI SITÆ.

*See* INSOLVENT DEBTOR, 6.

LICENSE. *See* SUNDAY LAW, 1, 2, 8.

LIEN.

1. The lien which partners have upon the partnership property, to enforce its application to the payment of the partnership debts, attaches to all their joint property, but relates no further. *Mann's Exc'r vs. Higgins and Miller*, 265.

*See* JUDGMENT AT LAW.
COURT OF CHANCERY, 18 to 23, 27, 28.
PRACTICE IN EQUITY, 24.

LIMITATION OF ACTIONS.

1. An action was instituted in March 1845, upon receipts dated in 1838, for money to be paid to certain creditors of the administratrix of the plaintiff, and in case of the refusal to receive the fund, it was to be repaid to the intestate. In 1838, all the creditors were paid, except one who refused to receive his proportion of the fund. The defendant *within three years*, said that he had, shortly after the refusal of the unpaid creditor, to receive his proportion of the money, loaned the amount offered to him and lost it: that his motive in making the loan was to get rid of the money, and he never would pay it unless the law compelled him. HELD: That these declarations were admissions, that the money had never been returned by the defendant; acknowledgments of a present subsisting debt, due by him and furnished no moral or legal excuse, why he should not pay the debt. The defendant's duty was, to return the money and not risk it by a loan. *Carter vs. Cross*, 43.
2. Where equity and law have concurrent jurisdiction over the same subject matter, the plea of limitations is equally available in both tribunals. In such case, equity follows the law. *Sindall and wife, vs. Campbell et al.*, 66.
3. Long acquiescence and lapse of time in obedience to the statute of limitations is a bar to a bill for an account. *Ib.*
4. *J, N & B*, partners in trade, made their promissory note, payable to *H*, or order: after it was due for more than three years, and after the dissolution of the house, it is not competent for one of the partners to revive the remedy on the note against the three, so as to avoid the plea of limitations. *Ellicott vs. Nichols*, 85.
5. A plaintiff, who seeks to extricate a case from the act of limitations, must shew a new promise, within three years prior to the institution of the suit, either express or implied. *Ib.*
6. It is not the mere acknowledgment of a subsisting indebtment, which removes the bar. Where a debt is admitted to be due, the law raises a promise to pay it, and it is this new promise, either made in express terms, or deduced from an acknowledgment, as a legal implication, which is to be regarded as reanimating the old promise, or, as imparting vitality to the remedy, extinct by lapse of time. *Ib.*

LIMITATION OF ACTIONS.—*Continued.*

7. By withdrawing from a joint debtor the protection afforded him by the act of limitations, he is subjected to a new liability. It practically and necessarily imposes upon him a new liability. *Ib.*
8. The case of *Whitcomb vs. Whiting*, 2 *Doug.*, 652, adopted. Part payment of principal and payment of interest, before the statute has attached, made by one joint debtor, is a payment by all, and takes the case out of the bar. *Ib.*
9. A defendant is not benefitted by the part payment of a debt barred by the acts of limitations, when the partial payment is made. *Ib.*
10. One co-promissor, who pays a debt barred by the act of limitations, against the consent of his co-debtor, cannot maintain an action for contribution against such co-debtor. *Ib.*
11. The case of *Ward vs. Howell*, 5 *H. & J.*, 60, does not decide any thing upon the subject of limitations. The remark of the court on that subject, is a *dictum*. *Ib.*

*See* LAPSE OF TIME.

LIMITED JURISDICTION.

*See* APPEAL, 4, 12.

LOTTERIES.

*See* CONSTITUTIONAL LAW, 8.

MARRIAGE, PROOF OF.

*See* EVIDENCE, 16, 18.

MAXIMS AND GENERAL RULES OF LAW.

1. The principle, that equity will consider that as done which ought to be done, is an established maxim; but the court, in order to be justified in regarding an act as done, must have jurisdiction of the case, and be able to insist that it shall be done. A mere parol agreement to execute a mortgage, is one of which a court of chancery can take no notice, and, of course, cannot regard it as performed. *Clabaugh and Landers vs. Byerly*, 354.
2. It is for the legislature, and not for the court to judge, what shall be, at any particular period, the policy of the insolvent system. The business of courts is faithfully to interpret the laws, without any regard to the private notions of the judges, touching the policy of this or that provision. *Stewart vs. The Union Bank*, 439.
3. It is an error to suppose that the maxim "once insane is presumed always insane," is unqualified in its character and of universal application. *Brooke, et al., vs. Townshend*, 10.

MERGER.

1. At common law, the original cause of action is extinguished or merged by a judgment, which is conclusive evidence of indebtment between the parties, with respect to the subject matter adjudicated. *Bank of the U. S., vs. Merchants Bank of Baltimore*, 416.

MINES. *See* SPECIFIC PERFORMANCE, 1.

MISTAKE.

*See* LAPSE OF TIME, 2.
COURT OF CHANCERY, 8.
SALES BY TRUSTEES, 2.

MORTGAGE—MORTGAGOR—MORTGAGEE.

1. Where there are two mortgages of the same property, that which is first recorded has preference under the act of 1825, ch. 203, and a subsequent mortgagee can have no relief against a mortgage executed and recorded prior to his own, unless he can show it to be fraudulent as against him. *Clabaugh and Landers, vs Byerly*, 354.
2. A mere parol agreement to execute a mortgage, is one of which a court of chancery can take no notice, and of course cannot regard it as performed. *Ib.*
3. The recitals in a subsequent mortgage, cannot prejudice the rights of a prior mortgagee, acquired before its execution. *Ib.*
4. The rule, that a prior mortgagee, who witnesses a subsequent mortgage, without disclosing his own incumbrance, will be postponed to such subsequent mortgage, does not apply where the prior mortgage is recorded. *Ib.*
5. Mere silence is not sufficient to affect the right of the prior mortgagee. There must be actual fraud charged and proved, such as false representations, assurances of good title, or deceptive silence when information is asked. The burden of proving such fraud lies on the subsequent mortgagee. *Ib*
6. Where a subsequent mortgagee knew of the existence of a prior mortgage, in September 1842, but made no complaint until February 1844: Held, that by such a delay he had lost his equity, if any ever existed in his favor. *Ib.*

*See* ARBITRATION AND AWARD, 3.
APPEAL, 8, 10.
PRACTICE IN EQUITY, 1, 9.

MUTUALITY.

*See* SPECIFIC PERFORMANCE, 1.

NEGROES AND SLAVES.

1. The act of 1833, ch. 224, authorising the county courts to extend the term of service of slaves for a term of years, in certain cases, and its supplement, the act of 1845, ch. 105, conferring the same power upon the several orphans courts of the State, give no jurisdiction, either to the county courts or the orphans courts, unless the master, mistress, or agent, resides in the county where the application is made. *Patterson vs. Crookshanks*, 211.
2. The appellee applied to the orphans court of *Washington* county, under the act of 1845, to extend the term of service of the appellant, who, he alleged, was sold to him as a slave for a term of years, to expire on the 1st of January 1844, and, in support of his title, offered a bill of sale for such term, manumitting the appellant thereafter, which was not recorded. HELD: That the appellee having treated the appellant as a freeman in the court below, he could not, upon an appeal to this court, turn round and impeach the instrument of his own title, on the ground of its defective execution and want of record, and thereby make the appellant a slave, in order to deprive him of a legal standing in the appellate court. *Ib.*

NEW TRIAL.
*See* COURT OF CHANCERY, 11.

NOTARY PUBLIC.
*See* BILLS OF EXCHANGE, &c., 1.

NOTICE BY NEWSPAPER PUBLICATION.
*See* SALES BY TRUSTEES, 1.

NOTICE OF PROTEST.
*See* BILLS OF EXCHANGE, &c., 1, to 12.

NUDUM PACTUM.
*See* CONTRACT, 1, 2, 3.

OBLIGOR AND OBLIGEE.
*See* PRINCIPAL AND SURETY.

OPINIONS OF WITNESSES.
*See* EVIDENCE, 1, 2, 3.

"OR," CONSTRUED "AND."
*See* WILL AND TESTAMENT, 1.

PARTNERSHIP AND PARTNERS.

1. In an action of debt, against a surviving partner, he pleaded a release. The plaintiff rejoined, that it was obtained by misrepresentation and fraud; that the defendant had represented the partnership was not able to pay, and could not pay, more than about one-fourth of the debt, when, in fact, it was possessed of sufficient property to pay the whole claim, which the defendant well knew, and that in consequence of the said false and fraudulent representation, the plaintiffs executed the release. The plaintiffs gave general evidence of the condition of the partnership affairs, as represented by the defendant to them, the alleged insolvency of the firm, prior to and at the time of the release, and that the firm continued until the death of the other partner. The deceased partner, on being informed, prior to his death, of the settlement with the plaintiffs at one-third of their claim, said, that the firm had, at the time of the alleged settlement, funds sufficient to have paid the plaintiffs in full, in the hands of the defendant, as liquidating partner. HELD, that this declaration of the deceased partner, was evidence to affect the defendant as his survivor. *Doremus, et al., vs. McCormick*, 49.
2. An innocent partner is constructively responsible for the fraudulent acts of his co-partner, when those acts are committed within the range and scope of partnership transactions. *Ib.*
3. The representation of any fact, or misrepresentation of any fact, made in any partnership transaction by one partner, is considered as the act of all the partners, and will bind the firm. *Ib.*
4. The fraud alleged to have been practised in this case, as the means of procuring the release, was connected with a partnership transaction, and employed by one partner, as a false pretence, to obtain a paper, in the execution of which the firm was interested. *Ib.*

PARTNERSHIP, &c.—*Continued.*

5. The composition of a debt, either as a creditor or as a debtor, is one of the acknowledged and frequently exercised powers of a partner. Is within the scope of his authority. *Ib.*
6. *J N & B*, partners in trade, made their promissory note, payable to *H* or order; after it was due for more than three years, and after the dissolution of the partnership, it is not competent for one of the partners to revive the remedy on the note against the three, so as to avoid the plea of limitations. *Ellicott vs. Nichols*, 85.
7. From the moment a partnership terminates, the partners become distinct persons with respect to each other, and, consequently, one partner can have no power to subject, by his acts or declarations, his former associates to new obligations. *Ib.*
8. The power of adjusting the unsettled affairs of a partnership, and, as a portion of this authority, the right to collect and pay the outstanding and subsisting debts of the firm, survives the dissolution, as a necessary power; yet, with this qualification, those who formerly were partners, stand to each other, after the dissolution, as if the association had never been formed. *Ib.*
9. The lien which partners have upon the partnership property, to enforce its application to the payment of the partnership debts, attaches to all their joint property, but relates no further. Partners as such, have no other equities in relation to the separate property of each other, than separate creditors. *Mann's Exc'r, vs. Higgins and Miller*, 265.
10. The executor of *J M* filed a bill in equity, alleging, that a partnership had existed between his testator and the defendant *H*, and praying for an account of the partnership transactions, and that a certain fund in the hands of a trustee, to which *H* was entitled in right of his wife, the same being her distributive share of her deceased father's real estate, might be enjoined and set apart for the payment of his claim. HELD: That the complainant had no lien, or claim in equity, on this fund, different from any other creditor of *H*, and that the injunction was rightly dissolved, and the bill properly dismissed. *Ib.*

PAYMENTS.

1. Prior to the act of 1834, ch. 293, payments *eo nomine* by an insolvent debtor, no matter what his views or expectations might be, were not declared to be fraudulent or void. *Stewart, trustee &c., vs. Union Bank of Maryland*, 439.
2. The acts of 1812, ch. 77, and 1816, ch. 21, though avoiding many acts done by an insolvent, yet do not include in the number an actual payment of money, *bona fide* due by him. *Ib.*
3. In this case it was HELD: That the payment of a debt in June 1832, by parties at that time in failing circumstances, and who in October of the same year, applied for the benefit of the insolvent laws, was not void under the insolvent system, as it then existed. *Ib.*

PEDIGREE.

1. In cases of pedigree, the declarations of a deceased person, and of the deceased members of the family, are admissible to prove *per se*, not only the issue, but the marriage, and the rule of evidence admitting such declarations, is not subject to the qualification, that cohabitation must be first shown to raise the inference of marriage. *Cope's, ad'mr, vs. Pearce*, 247.
2. It is upon the ground of necessity that these declarations are admitted, as an exception to the general rule excluding hearsay evidence, cases of pedigree being often incapable of proof, and depending entirely upon reputation. *Ib.*
3. The term "pedigree," embraces not only descent and relationship but also the facts of births, marriages and deaths, and the times when these events happen. *Ib.*

PLEAS AND PLEADING.

1. Where a statute contains an exception, so incorporated with its enacting clause that the one cannot be read without the other, the rule of pleading is, that the indictment must negative the exception; but where, after general words of prohibition, an exception is created in a subsequent clause or section, it must be interposed by the accused as a matter of defence. *Bode vs. The State*, 327.
2. But this rule has no application to an indictment under the act of 1847, chap. 193. That act, by its true construction, being confined and limited, in its character and prohibitions, to a designated class, there are no exceptions to be negatived, or to be pleaded by the accused, as a matter of defence. *Ib.*
3. A suit was commenced, by an attachment, issued on the 11th of September 1841. The plaintiff filed a declaration in *assumpsit* on the 29th of April 1842, to which the defendants, on the same day, pleaded *non assumpsit*, and on the 10th of June 1842, under leave to amend, they pleaded, that the plaintiff ought not further to maintain its action, because the plaintiff, on the 23rd of April 1842, had recovered a judgment against the defendants in the district court for the city and county of *Philadelphia*, in the State of *Pennsylvania*, for the same cause of action, in a suit commenced in said court since the issuing of the original writ in this case, which judgment remains unreversed, and in full force and effect. HELD: That this defence was directed against the right of the plaintiff to recover in the form of action adopted by it, and could not be pleaded in abatement, *puis darrein continuance*, but was properly interposed as a special plea, in bar to the further maintenance of the action. *The Bank of the U. S. vs. Merchants Bank of Baltimore*, 415.
4. It is not the priority in the commencement of one action that renders the judgment obtained therein, a bar to the recovery of a second judgment in another, but because the first judgment when given, whether in the action commenced first or last, extinguishes the original cause of action, and gives to the plaintiff in lieu thereof one of a higher nature. *Ib.*

PLEAS, &c.—*Continued.*

5. The pendency of another suit must be pleaded in abatement, but the plea of a judgment recovered, is not matter in abatement. It does not go to the form of the remedy, but to the right of the plaintiff. *Ib.*
6. The pendency of a prior suit for the same cause of action will abate a subsequent suit, but the converse of this is not true; the first suit will not be abated by the plea of another suit afterwards commenced for the same cause of action. *Ib.*
7. If the matter presented by this plea had been, the pendency of a suit in another State for the same cause of action, it should have been pleaded in abatement, and verified by affidavit or supported by an exhibition of the record, and the proper place for such a plea would have been in the *Pennsylvania* suit. *Ib.*
8. Where matter of defence arises after the commencement of a suit, it cannot be pleaded in bar of the action generally; it must, if it arises before plea or continuance, be pleaded as to the further maintenance of the suit, if after issue joined, *puis darrein continuance*. *Ib.*
9. The right to assail a judgment, on the ground that the court pronouncing it had no jurisdiction of the subject or the parties, is undoubted, both with respect to domestic and foreign judgments. *Ib.*
10. But it is an acknowledged and fixed principle of universal obligation, resulting from the comity, and respect due from one judicial tribunal to another, that a judgment of a court of record of a sister State, is in itself *prima facie* evidence of jurisdiction; and it is not necessary for the party pleading such judgment, to set out affirmatively in his plea, the jurisdiction and facts upon which the power and authority of the court pronouncing the judgment depend. *Ib.*
11. A plea which would be regarded as an answer to an action of *assumpsit*, if unaccompanied by an attachment, must be treated as valid, notwithstanding the controversy originated in a proceeding of that kind. *Ib.*
12. The 5th sec. of the act of 1832, ch. 250, authorising a corporate body to appear to an attachment and contest the claim of the plaintiff, by "pleading or otherwise," clearly gave the right to the appellants to file the plea interposed by them in this cause. *Ib.*

*See* ASSUMPSIT.
PRACTICE.

PRACTICE.

1. Caveators who are the assailants of a will, and the actors who originated a petition to prevent its being admitted to probate, their allegations of fact being controverted, are entitled to be placed upon the record in the attitude of plaintiffs, and are therefore entitled to open and conclude the argument before the jury empannelled to try the issues sent from an orphans court to the county court, in relation to such controverted facts. *Brooke, et al., vs. Townhend*, 10.
2. Upon the trial of issues of fact, designed to impeach the validity of a will, that instrument must be in evidence before the jury, and, if

PRACTICE.—*Continued.*

not produced in the county court by the register of wills, the caveators, plaintiffs upon the record, ought to have coerced its production by a *subpœna duces tecum*, directed to that officer. *Ib.*

3. But where the *factum* of the will was admitted by the pleadings, and assumed by the issues, evidence is unnecessary to establish that conceded fact. *Ib.*
4. Where the county court, under such circumstances, excludes the evidence of the subscribing witness to establish the conceded *factum* of the will, it is not error. *Ib.*
5. Where there is proof of general rationality, and also of delusion, in a testator, it would be an encroachment on the rights of the jury for the court to assume, that the delusion under which the testator labored, was habitual, and therefore put the onus of proof, that he was free of such delusion at the execution of the will, on the caveatees. *Ib.*
6. The character of the delusion under which a party labors, as whether temporary or habitual, is within the exclusive province of the jury. *Ib.*
7. The circumstance, that proof of delusion is all on one side, does not authorise the court to direct the jury, that it proves the fact. The jury have the right to refuse their credit to it. *Ib.*
8. An action was instituted in March 1845, upon receipts dated in 1838, for money to be paid to certain creditors of the administratrix of the plaintiff, and in case of their refusal to receive the fund, it was to be repaid to the intestate. In 1838, all the creditors were paid, except one, who refused to receive his proportion of the fund. The defendant *within three years*, said that he had shortly after the refusal of the unpaid creditor to receive his proportion of the money, loaned the amount thereof and lost it; that his motive in making the loan, was to get rid of the money, and he never would pay it unless the law compelled him. HELD: Under the circumstances of this case, the question of interest was for the jury, and the court refused to instruct them, that it could not be recovered anterior to the date of the writ. *Carter vs. Cross*, 43.
9. Whether due diligence has or has not been used, and whether or not legal notice has been given, are questions of law, to be decided by the court, unless the evidence is doubtful or contradictory. *Bell vs. The Hagerstown Bank*, 217.
10. The possession of the note by the appellees, previously endorsed by them, through the cashier, their agent, and produced by them as their cause of action, is *prima facie* evidence of property in them, and they are to be regarded as the *bona fide* owners, notwithstanding the subsequent endorsements, and entitled to sue upon it. *Ib.*
11. Where a prayer omitted material facts, of which testimony had been offered, and which were essential to raise the question upon which, by the prayer, the decision of the court was invoked: HELD, that it was properly rejected. *Beall's lessee vs. Beall and Hendrixon*, 233.

PRACTICE—*Continued.*

12. When judgment is for the defendant, the costs are always adjudged against the legal plaintiff on the record, and the successful party may either proceed against him for costs, or against the *cestui que use*, as provided by the act of 1801, ch. 74. *Selby et al., vs. Clayton*, 241.

13. In an action of slander, where the plaintiff, to prove malice and aggravate the damages, gives in evidence other and different words, spoken subsequent to those laid in the declaration, the defendant, to repel the malice, and in mitigation of damages, may give the truth of such new matter in evidence, under the plea of not guilty, even though such new words be in themselves actionable. *Wagner vs. Holbruner*, 296.

14. Where the plaintiff confines himself to the proof of the words laid in his declaration, the defendant, although he will not be allowed to give in evidence the truth of the defamatory matter, without a special plea of justification, may yet, on the plea of not guilty, prove in mitigation, such facts and circumstances as shew a ground of suspicion, not amounting to actual proof of the guilt of the plaintiff. *Ib.*

15. Since the act of 1825, ch. 117, a prayer, "that the plaintiffs were not entitled to recover," is too general, and for refusing to grant such a prayer, the judgment of the county court cannot be reversed on appeal to this court. *Wheeler vs. The State, use of Bateman's Admr's*, 343.

16. If an insolvent could successfully impeach an agreement transferring property for fraud, the property remains in him, and is transferred to his trustee, who then acquires a right to sue for it, and even if the insolvent could not sue for it, being *particeps criminis*, yet the trustee may. *Gardner vs. Lewis*, 378.

17. Whether a deed be fraudulently obtained from an insolvent, or be the result of fraud practised upon him, if thereby his creditors are defrauded, the trustee is the person to claim the property in their behalf. *Ib*

18. By our laws, all the property of an insolvent, wherever situated, is conveyed to the trustee, and though other States may not so declare in regard to property for which the trustee brings suit in their courts, yet if the property be brought back to *Maryland*, our courts will regard it as part of the trust fund, to which the trustee is entitled. *Ib.*

19. It is not necessary for the trustee, in order to recover in *trover* goods fraudulently obtained from the insolvent, to pay or tender to the defendant the money he paid to the insolvent at the time when the fraudulent agreement was entered into, and as a consideration therefor. *Ib.*

20. The county court instructed the jury, that if they found that the debtor intended to transfer his property to a creditor by a certain agreement, and at the time of such agreement, he had no reasonable expectation of being exempt from liability or execution for or on

PRACTICE.—*Continued.*

account of his debts, without applying for the benefit of the insolvent laws, and that the creditor at the time had notice of the debtor's condition of insolvency, then such transfer was made under a view and intent of becoming an insolvent debtor, with intent thereby to give an undue and improper preference to such creditor, and vested in him no title to the property. HELD, that this instruction was properly granted. *Ib.*

21. When any transaction necessarily produces the effect which a statute declares fraudulent as against creditors, the court may pronounce such act fraudulent. Whatever is the necessary consequence of an act deliberately done, *that* the law presumes every man to intend. *Ib.*

*See* PRACTICE IN EQUITY.

PRACTICE IN COURT OF APPEALS.

APPEAL, 5, 6, 7.

LIMITATION OF ACTIONS, 5, 6, 10.

COURT OF CHANCERY, 11.

CONTRACT, 7.

## PRACTICE IN THE COURT OF APPEALS.

1. Where the bill of exceptions presents to the county court no question upon the pleadings, none is presented here. In such cases, the questions to be decided arise upon the proof, without reference to the pleadings, which are assumed to be correct. *Brooke, Adm'r, vs. Waring*, 5.
2. Upon an appeal to the December term of this court 1847, errors were assigned, and a rule argument entered at June term 1848, the next succeeding term. The cause was set down for trial at December term 1848, when, at the call of the cause, the counsel of the appellee appeared, and suggested the death of his client, in January 1848. HELD, that the cause did not abate. *Carroll vs. Bowie*, 34.
3. At common law, if the *plaintiff in error* dies after errors assigned, it does not abate the writ; and a writ of error does in no case abate by the death of the *defendant in error*, whether it happen before or after errors assigned. *Ib.*
4. The act of 1806, ch. 90, sec. 11, has no application to the case of the death of the defendant in error. It relates only to deaths *after* rule argument laid. *Ib.*
5. The act of 1815, ch. 149, sec. 6, declares, that in all appeals or writs of error, the same shall not abate by the death of either party, if the proper person necessary to be made party shall, at the first or second term succeeding the death, appear for the purpose of prosecuting or defending the same. *Ib.*
6. But it is not to be inferred, that the heir, &c., or other proper person to be made a party, if a defendant, may elect to suffer a cause to abate, and so deprive the other party of the fruits of his judgment. Such a construction of the act of 1815, would constructively repeal the act of 1806. *Ib.*

PRACTICE IN THE COURT OF APPEALS—*Continued.*

7. The acts of 1806, ch. 90, sec. 11, and 1845, ch. 149, sec. 6, should be construed together; the former is confined to cases of death after rule argument, which points to the third term of the court, while the latter designs to extend the death to all prior stages in the cause, if the party proper to be made accepts the privilege conferred by that act. *Ib.*

8. The object of the act of 1815, was to prevent the abatement of appeals in certain cases, and intended that the party interested in sustaining the judgment of the court below, should have the privilege of appearing to prosecute or defend here. *Ib.*

9. The act of 1815, is to be confined to such cases as did abate by the death of the party before that act passed. *Ib.*

10. A memorandum filed in a cause, objecting to the competency of testimony, not signed by counsel, is not an exception within the act of 1832, ch. 302, sec. 5. *Sindall and wife, vs. Campbell, et al.*, 66.

11. The court being of opinion, that the substantial merits of the case were not determined by the affirmance of the judgment of the court below the cause was remanded with a procedendo under the act of 1830, ch. 186. *Beall's lessee vs. Beall and Hendrixon*, 233.

12. A decree of this court remanding a cause, with directions for further proceedings is, as to all questions decided by it, conclusive and obligatory upon this court as well as the court below, and no error can be imputed to the county court in its subsequent proceedings conforming thereto, when such proceedings are reviewed on a second appeal to this court. *Mong vs. Bell*, 244.

13. An appeal will not lie from a decree, which, upon its face, appears to have been made by consent of parties; but such an objection must be taken upon the final hearing, and not upon motion to dismiss. *Williams vs. Williams*, 302.

14. Upon a former appeal in this case, this court passed a decree reversing the decree of the chancellor, and remanding the cause to the court of chancery, with directions to sell the mortgaged premises, according to the usual course in such cases, unless the appellant should pay into that court the sum ascertained, by an audit directed to be made in this court, to be due to the appellee. HELD: That this was a final decree, disposing of the entire subject in controversy upon the pleadings and proofs exhibited, and the only authority remaining to the chancellor over the subject was, to carry that decree into execution. He was necessarily confined to the limits prescribed to him, whatever further or ulterior equity might have arisen in favor of the appellant, after the passing of the original decree by the chancellor. *McClellan vs. Crook*, 333.

15. This decree has become the law of the case, and the chancellor cannot otherwise deal with the matters adjudicated by it, than in the form it prescribes. *Ib.*

16. Where evidence appears upon the record of a prospective or continuing equity, of the same character as that passed upon, this court will limit itself to an exposition of the principles involved, and re-

PRACTICE IN THE COURT OF APPEALS.—*Continued.*

mand the cause, to have the account stated in chancery within those principles; but if no such evidence appears, it will pass a definitive and final decree. *Ib.*

17. Since the act of 1825, ch. 117, a prayer, "that the plaintiffs were not entitled to recover," is too general, and for refusing to grant such a prayer, the judgment of the county court cannot be reversed on appeal to this court. *Wheeler vs. the State, use of Bateman's Adm'rs*, 343.

18. The appellee applied to the orphans court of *Washington* county, under the act of 1845, to extend the term of service of the appellant, who, he alleged, was sold to him as a slave for a term of years, to expire on the 1st of January 1844, and, in support of his title, offered a bill of sale for such term, manumitting the appellant thereafter, which was not recorded. HELD: That the appellee having treated the appellant as a freeman in the court below, he could not, upon an appeal to this court, turn round and impeach the instrument of his own title, on the ground of its defective execution and want of record, and thereby make the appellant a slave, in order to deprive him of a legal standing in the appellate court. *Patterson vs. Crookshanks*, 211.

PRACTICE IN EQUITY.

1. A memorandum filed in a cause, objecting to the competency of testimony, not signed by counsel, is not an exception within the act of 1832, chap. 302, sec. 5. *Sindall and wife, vs. Campbell, et al.*, 66.

2. Where equity and law have concurrent jurisdiction over the same subject matter, the plea of limitations is equally available in both tribunals. In such case, equity follows the law. *Ib.*

3. Long acquiescence and lapse of time in obedience to the statute of limitations is a bar to a bill for an account. *Ib.*

4. The 3rd sec. of the act of 1835, ch. 380, shows, that a defendant who has answered a bill for an injunction, may appeal from the granting or refusal to dissolve it upon motion, without waiting for the answers of his co-defendants. *Barnes, et al., vs. Dodge*, 109.

5. A claim on which an action at law might have been sustained, cannot be used as a set-off in equity against an assignee of another legal claim. *Hutchins vs. Hope*, 119.

6. Injunctioncauses upon motion to dissolve, are usually heard on bill and answer. Allegations in the answer, not responsive to the bill, without proof, do not affect the injunction. *Ib.*

7. At final hearing the defendant need not prove his allegations, in avoidance, in the first instance. The complainant must then establish his case. All his allegations then not proved are taken against him. *Ib.*

8. It is the duty of a court of equity, in a case like this, to look to all the circumstances, and if the *status* of the party before them is involuntary, to assign him an equitable position in court, in relation to all the other parties, and not to make him *the actor*, to his own preju-

PRACTICE IN EQUITY.—*Continued.*

dice, where his standing in court will bear any other more favorable construction. *Carter and wife, vs. Dennison*, 159.

9. A judgment at law was enjoined by an injunction founded upon the allegation of the bill, that the complainant was the holder of a single bill which he was entitled to set-off against the claim upon which the judgment was recovered. One of the defendants, in his answer, admitted the execution of this single bill, the others state that they had no knowledge of its existence. No proof was offered upon this point, and the injunction was dissolved and the bill dismissed upon *final hearing*. HELD: That in this condition of the case, it was incumbent on the complainant to sustain, by proof, the material allegations of his bill. He could not rely upon the silence of the defendants. *Briesch vs. McCauley*, 189.

10. If the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing. Upon a motion for dissolution, they are to be taken as true. *Ib.*

11. It is an established principle of evidence, that the answer of one defendant cannot be read in evidence against his co-defendant. *Ib.*

12. Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of equity. *Ib.*

13. But a defence cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of the court, that the defence ought to have been sustained at law. *Ib.*

14. Where a decree required the trustees to give "at least three weeks previous notice, inserted in some newspaper or papers, and such other notice as they might think proper, of the time, place, manner and terms of sale:" HELD, that an advertisement of this sale, inserted once a week for three weeks, and once on the day of sale, in two daily newspapers, was sufficient notice, and that the trustees were not bound to advertise the property daily for three weeks previous to the sale. *Johnson vs. Dorsey*, 269.

15. A sale regularly conducted, and fairly made under the authority of a court of chancery, where a third party, a stranger to the proceedings, becomes the purchaser, cannot be disturbed on the ground of *mistake*, unless such mistake has been caused by the conduct of the purchaser, or can be traced to the creditor, for whose use the property was sold, or to the trustee. *Ib.*

16. The *English* practice of opening biddings, as a matter of course, before the ratification of the master's report, has not been adopted in *Maryland*, and it is not expedient to introduce it. *Ib.*

17. An appeal will lie from a decree of the court of chancery, upon a mortgage executed in conformity with the provisions of the act of 1833, ch. 181, relating to mortgages in *Baltimore* city. *Williams vs. Williams*, 302.

PRACTICE IN EQUITY.—*Continued*

18. An appeal will not lie from a decree which, upon its face, appears to have been made by consent of parties. *Ib.*

19. The agreement for a decree in a mortgage, executed under the act of 1833, is to be regarded only as a consent, to dispense with the intermediate proceedings of subpœna and answer, in order to facilitate a decree, and not that the decree shall be binding at all hazards. *Ib.*

20. Upon a former appeal, the Court of Appeals passed a decree reversing the decree of the chancellor, and remanding the cause to the court of chancery, with directions to sell the mortgaged premises, according to the usual course in such cases, unless the appellant should pay the sum ascertained by an audit, made in the Court of Appeals, to be due the appellee. HELD, That this was a final decree of the appellate court, disposing of the entire subject in controversy, upon the pleadings and proofs exhibited, and the only authority remaining to the chancellor over the subject, was to carry that decree into execution. He was necessarily confined to the limits prescribed to him, whatever further or ulterior equity might have arisen in favor of the appellant, after the passing of the original decree by the chancellor. *McClellan vs. Crook*, 333.

21. This decree has become the law of the case, and the chancellor cannot otherwise deal with the matters adjudicated by it, than in the form it prescribes. *Ib.*

22. Where the *prochein ami* of an infant dies during the prosecution of the suit, the court will appoint another. *Richard's and wife, vs. Swan, et al.*, 367.

23. Where a guardian has been removed by order of the orphans court, the ward may, during his minority, come into court by his next friend, and call such guardian to account. *Ib.*

24. Prior to the act of 1835, ch. 380, the general rule was, that a creditor, before he could file a bill in equity to pursue property fraudulently conveyed, must obtain, by judgment or otherwise, a lien on the property; but that act has removed the necessity of a lien as preliminary to this mode of equitable relief. *Ib.*

25. There being no proof that the defects in the award were at the instance or by the procurement of the complainants, their bill should have been dismissed, without prejudice. *Emery, Gault & Yager, vs. Owings*, 455.

*See* COURT OF CHANCERY, 4, 6, 7.

PREFERENCE DEEDS.

1. In the case of *Albert and wife, vs. Winn and Ross, et al., ante* 447, the court, (DORSEY, C. J., MARTIN and PEARCE, J., (MAGRUDER, J., dissenting,) decided, that a deed conveying all the grantor's property to certain trustees, in *trust:* 1st. To defray the expenses attending the execution of the trust. 2nd. To the payment of the several creditors named in the schedule annexed to the deed. 3rd. To the payment of the claims of such creditors as shall, on or before

PREFERENCE DEEDS.—*Continued.*

a given day, execute and deliver to the trustees full and absolute releases and acquittances of such claims; and 4th. If any surplus shall remain, to apply the same to the satisfaction of the claims of all other creditors of the grantor, without distinction or priority, was fraudulent and void, both at common law, and under the statute of the 13*th of Elizabeth.*

2. Upon a review of all the authorities, it was the opinion of the court in that case, that a deed which does not fairly devote the property of the debtor, in desperate circumstances, to the payment of his creditors, but prescribes to them the terms upon which they shall receive part payment, is, in law, fraudulent and void. *Ib.*

3. *But in the case of Kettlewell vs. Stewart, decided at June term*, 1850, *not yet reported, the court*, CHAMBERS, MAGRUDER *and* SPENCE, J., (MARTIN and FRICK, J., dissenting, and DORSEY, C. J., not sitting in the case,) *sustained a deed containing similar provisions to the one in Albert and wife, vs. Winn and Ross. See Albert and Wife, vs. Winn and Ross*, 446, *and note at the end of the case.*

*See* FRAUD AND FRAUDULENT CONVEYANCES.

PRESUMPTION OF LAW AND OF FACT.

1. The possession by an obligor of a bond, a surety in the bond, creates a presumption in law that it has been paid. *Carroll vs. Bowie*, 34.

2. An admission in an answer, that two persons jointly purchased a slave, does not prove they were joint tenants. The presumption is, that each paid one-half of the purchase money, and were tenants in common. *Gibbons, Exc'r of Riley, vs. Riley*, 81.

3. From an acknowledgment tainted by fraud, the law would infer no new promise. *Ellicott vs. Nichols*, 86.

4. Cohabitation *alone*, proved between parties, as man and wife, is sufficient to raise the presumption of legal marriage, when the parties have been long dead, and any declarations made by them, as to their being or not being married, may be used to strengthen or weaken this presumption. *Cope's Adm'r, vs. Pearce*, 274.

5. When any transaction necessarily produces the effect which a statute declares fraudulent as against creditors, the court may pronounce such act fraudulent. Whatever is the necessary consequence of an act deliberately done, *that* the law presumes every man to intend, *Gardner vs. Lewis*, 379.

6. At common law, the original cause of action is extinguished or merged by a judgment, which is conclusive evidence of indebtment between the parties, and final, unless reversed, with respect to the subject matter adjudicated; and in the absence of proof of any statutory modification of this principle, it must be assumed, that such is the legal effect of judgments of their courts in the State of *Pennsylvania. Bank of the U. S., vs. Merchants Bank of Baltimore*, 416.

*See* INSANITY, 2.

COURT OF CHANCERY, 3, 8.

CONTRACT, 6.

PRINCIPAL AND SURETY.

1. At common law, where one joint obligor has satisfied the bond, his remedy against his co-obligors is in *assumpsit* for contribution, *Carroll vs. Bowie*, 34.
2. In such a case, payment by one, works a satisfaction of the bond; and the only remedy is, to recover back from *the other sureties* in the bond, their proportion of the payment; or, from the principal the whole amount. *Ib.*
3. By the 7th sec. of the act of 1763, ch. 23, where any person is bound in a bond or obligation, which shall be unpaid by the principal debtor, and the money due be paid or tendered by the surety, the obligee shall assign such bond to the surety, and he may, by virtue of the assignment, have an action in his own name against the principal debtor, but this section gives no remedy against a co-surety. *Ib.*
4. Neither does the 9th section of that act, give any remedy to one co-surety against another. It does no more than to supersede the common law, and give to the assignee, as the holder of a bond of third parties, the right to sue in his own name, the principal debtor; not to affect pre-existing rules between co-sureties. *Ib.*
5. If a principal obligor, and a surety, be sued on the bond by a co-surety, who claims as assignee from the obligee, he can recover but one-half from the co-security, while he claims the whole sum from the obligor. Such an incongruity cannot subsist at law. *Ib.*
6. The act of 1829, ch 51, which authorises an assignee of a bond to sue in his own name, does not apply to the relation of co-sureties It was not intended any more than the act of 1763, to affect questions which depend upon principles of contribution. *Ib.*

PROCEDENDO.

*See* PRACTICE IN COURT OF APPEALS, 11.

PROCHEIN AMI.

1. Where the *prochein ami* of an infant dies during the prosecution of the suit, the court will appoint another. *Richards and wife, vs. Swann, et al.*, 367.

PROMISSORY NOTES.

*See* BILLS OF EXCHANGE, &c.

PROTEST.

*See* BILLS OF EXCHANGE, &c., 1 to 12.

PURCHASERS.

*See* PRACTICE IN EQUITY, 15, 16.

RECEIPT.

*See* RELEASE.

RECEIVERS.

1. A receiver is an officer of the court, but his appointment determines no right, nor does it affect the title of the property in any way; it will not prevent the running of limitations. His holding is the holding of the court, for him from whom the possession was taken. He is appointed on behalf of all parties, and if any loss arise from

RECEIVERS.—*Continued.*

deficiency in his accounts, the estate must bear it. *The U. S. Insurance Company*, 307.

2. The effect of his appointment, is not to oust any party of his right to the possession of the property, but merely to retain it, for the benefit of the party ultimately entitled, and when such party has been ascertained, the receiver will be considered as his receiver. *Ib*

REMEDY AT LAW.

1. A bill was filed by the appellee, against his guardian, and the sureties in his guardian's bond, for an account, in which it was stated, that one of the securities in said bond was solvent. HELD: That the party had a remedy at law, and the bill was dismissed. *Lawson, et al., vs. Davis*, 345.

RENTS AND PROFITS.

*See* COURT OF CHANCERY, 1, 2.

REPORTS OF ADJUDGED CASES.

*See* EVIDENCE, 22.

SALES BY TRUSTEES.

1. Where a decree required the trustees to give, "at least, three weeks previous notice, inserted in some newspaper or papers, and such other notice as they might think proper, of the time, place, manner, and terms of sale." HELD: That an advertisement of this sale, inserted once a week for three weeks, and once on the day of sale in two daily newspapers, was sufficient notice, and that the trustees were not bound to advertise the property *daily*, for three weeks previous to the sale. *Johnson vs Dorsey*, 267.

2. A sale regularly conducted and fairly made, under the authority of a court of chancery, where a third party, a stranger to the proceedings, becomes the purchaser, cannot be disturbed on the ground of mistake, unless such mistake has been caused by the conduct of the purchaser, or can be traced to the creditor for whose use the property was sold, or to the trustee. *Ib.*

3. Where there was a general impression in the community that the sale would be postponed, and this was known to the exceptant, it was his duty to communicate the fact to the trustees, and his failure to do so, would present an insuperable obstacle to the interposition of a court of equity, in his favor, to set aside the sale. *Ib.*

4. The *English* practice of opening biddings, as a matter of course, before the ratification of the master's report, has not been adopted in *Maryland*, and it is not expedient to introduce it. *Ib.*

5. The land was sold for $12,422.25. HELD, that the court would not be authorised to vacate the sale upon the single ground of inadequacy of price, even assuming the property to be worth $20,000; the estimate placed upon it by the exceptant. *Ib.*

6. Inadequacy of price, standing by itself, is not sufficient to vacate a sale, unless it be so gross and inordinate, as to indicate some mistake or unfairness in the sale, for which the purchaser is responsible, or misconduct or fraud in the trustee. *Ib.*

PRINCIPAL AND AGENT.

1. A [illegible] hams court of *Washington* county, in the *District of Columbia*, [illegible] reated under a public statute of the *United States*, any judicial tribunal of *Maryland*, acting under the act of 1813, may judicially recognize the seal of said court, without requiring any proof of its genuineness, or indentity, other than that afforded by the inspection thereof. *Mangum vs. Welling's Admr's*, 78.

SLANDER.

1. In an action of slander, where the plaintiff, to prove malice and aggravate the damages, gives in evidence other and different words, spoken subsequent to those laid in the declaration, the defendant, to repel the malice, and in mitigation of damages, may give the truth of such new matter in evidence, under the plea of not guilty, even though such new words be in themselves actionable. *Wagner vs. Holbrunner*, 296.

2. Where the plaintiff confines himself to the proof of the words laid in his declaration, the defendant, although he will not be allowed to give in evidence the truth of the defamatory matter, without a special plea in justification, may yet, on the plea of not guilty, prove in mitigation, such facts and circumstances as shew a ground of suspicion, not amounting to actual proof of the guilt of the plaintiff. *Ib.*

SPIRITUOUS LIQUORS.

*See* SUNDAY LAW, 1, 2.

SPECIFIC PERFORMANCE.

1. An agreement set forth, "that *B* had on his farm, copper and other minerals, and is desirous to have the same properly explored and worked"—that "*P* is willing to undertake such exploration and working." *W*, "in consideration of one dollar paid to him by *P*, agrees to give *P* the power to make such exploration and works, as *P* may think proper for such purposes, and reduction and conversion of the minerals, and dispose of the same;" that *W* reserves to himself *one-fifteenth* part of all such minerals and metals, after the same shall have been rendered fit for smelting, free and clear of all expenses; that *P* shall commence on or before, &c. HELD, upon a bill filed by the assignee of *P*, for specific execution of the contract, that *P* was only bound to *explore* the mines, not to *work* them, and that he only stipulated to explore them on or before a given day, and therefore specific execution, for want of mutuality in the contract, could not be decreed. *Tyson vs. Watts*, 124.

SUNDAY LAW.

1. The act of 1847, ch. 193, prohibiting the sale of spirituous liquors on the Sabbath day, was intended to embrace only the licensed tavern keepers, and the licensed retailers of the liquors and cordials therein designated. *Lusby vs. The State*, 326.

2. This act has no application to the importer, who is authorised to sell spirituous liquors in the form in which they were imported, without obtaining a license from the State of *Maryland*, by force of the Con-

SUNDAY LAW.—*Continued.*

stitution of the *United States*, as expounded in the case of *Brown vs. The State of Maryland*, 12 *Wheat.*, 419. *Ib.*

3. The right of the State to impose the limitations and prohibitions contained in the act of 1847, ch. 193, upon the class of persons intended to be embraced by it, cannot be doubted. *Ib.*
4. An indictment founded upon the act of 1847, ch. 193, will be defective, unless it describe the party accused, as a licensed tavern keeper or a licensed retailer of spirituous liquors, they being the class of persons, upon whom alone, the provisions of the act were designed to operate. *Ib.*
5. To carry into effect the intention of the legislature in framing this statute, and to enable the courts of criminal jurisdiction to execute its provisions, it is necessary to incorporate into it, by interpretation, the terms, "licensed tavern keepers, and licensed retailers." *Ib.*
6. Where a statute contains an exception, so incorporated with its enacting clause that the one cannot be read without the other, the rule of pleading is, that the indictment must negative the exception; but where, after general words of prohibition, an exception is created in a subsequent clause or section, it must be interposed by the accused as a matter of defence. *Ib.*
7. But this rule has no application to an indictment under the act of 1847. That act, by its true construction, being confined and limited, in its character and prohibitions, to a designated class, there are no exceptions to be negatived, or to be pleaded by the accused, as a matter of defence. *Ib.*
8. The provisions of this act, with respect to the forfeiture of the license of the party convicted a second time for the same offence, clearly establishes the necessity of incorporating into the indictment a description of the party charged. *Ib.*

TAVERN-KEEPERS.

*See* SUNDAY LAW, 1, 3, 4.

TENANTS IN COMMON.

*See* JOINT TENANTS, 1.

TESTAMENTARY CAPACITY.

1. Where there is testimony in a cause conducing to prove, that a will was the direct consequence of the delusion under which the testator labored; a delusion calculated to pervert his judgment with respect to the disposition of his estate, it is perfectly clear, that he could not be considered as possessing a testamentary capacity, although, upon other subjects, he may have been rational and sane. *Brooke et al., vs. Townshend*, 10.

TOLLS.

*See* CONSTITUTIONAL LAW, 3, 6.

TRUSTEE IN INSOLVENCY.

*See* INSOLVENT DEBTOR, 2, 3, 4, 5, 7.

TROVER. *See* PRACTICE, 19.

USURY.

1. On the 20th of October 1846, *J S* applied for relief under the insolvent laws, to the commissioners of insolvent debtors for the city and county of *Baltimore*, who granted him a final discharge, appointed his permanent trustee, and transmitted the proceedings to *Baltimore* county court. His real estate was then sold by order of said court, and the proceeds brought in for distribution. The cause was then referred to the auditor in insolvency, with directions to give notice to the mortgage and lien creditors to file their claims before a certain day, and to state accounts appropriating the funds to their payment. The auditor, in account B, applied a large sum to *D's* mortgage, filed in pursuance of said notice, being first in priority, dated in 1840, and purporting to secure the sum of $16,000, loaned for the term of ten years; but, by an adjustment made between *D* and the trustee, on the ground of alleged usury, the sum actually loaned was computed at $11,495, with interest from 1840. By this application, the fund was exhausted before reaching the mortgage of the appellants, who thereupon filed the plea of usury against *D's* claim, which in account C was excluded. These two accounts being submitted, *Baltimore* county court ratified the first, allowing the claim of *D*, as adjusted, and rejected the second. Upon the merits, it was HELD, that under the statute of this State against usury, there can be no recovery upon an usurious contract, in any proceeding instituted by the usurious creditor, either at law or in equity. If he becomes the actor and originator of the proceedings, he must fail as plaintiff; because there is no *forum* wherein he may enforce an agreement declared by law to be tainted and forbidden. *Carter and wife, vs. Dennison*, 158.

2. But where the debtor himself seeks relief, and brings his usurious creditor, with his contract, into a court of conscience, relief will only be extended to him, on his paying, or offering to pay, the principal and legal interest of the sum due; upon the principle, that he who seeks equity, to obtain relief, must do equity. *Ib.*

3. In this case, where the creditor was compelled by the court, to file his mortgage before it was due, and was placed in his present posion by the act of the law, he cannot be regarded as the *actor;* but the subsequent mortgagees, who interpose the plea of usury and demand relief against him on this ground, are the actors, and their case is fully within the spirit, if not the letter, of the rule, that requires equity first from them. *Ib.*

WILL AND TESTAMENT.

1. A testatrix devised and bequeathed all her real and personal estate to her niece, *M T.* The will then proceeds: "should my said niece die leaving children, all the real and personal estate, herein before devised and bequeathed to her, shall vest in such child or children absolutely and in fee-simple, provided such child or children should attain the age of twenty-one years, or previously marry, but should my said niece die *unmarried and without leaving children*, and should she die leaving children, and such child or children die before the

WILL AND TESTAMENT.—*Continued.*

age of twenty-one years, *or* without having married previous to the attainment of such age," then over to her other nephews and nieces. HELD: That to effectuate the general intent of the testatrix, the word "*and*," between the word "unmarried," and the words "without leaving children," must be construed "*or*," and the word "*or*," between "years," and "without," must be construed "*and*." *Janney vs. Sprigg*, 197.

2. This conversion of "*and*" into "*or*," and of "*or*" into "*and*," will be made to effectuate the clear intent as apparent upon the whole will, either for the benefit of the first devisee and his issue, or for the benefit of the ulterior devisee. *Ib.*

3. The clear intention of this testatrix was, that her estate devised, should first vest in her niece, *M T*, and in the event of her leaving a child or children, it should vest in such child or children in fee simple, provided they attained the age of twenty-one years or previously married; and in the event of *M T's* death without children, the estate should pass under the limitation, over to her other nephews and nieces. *Ib.*

4. The estate being limited over, after the death of the niece, to her children in fee, and then contingently over to the ultimate devisees, so that the children taking no part of the realty, by inheritance, from their mother, but holding under the will as purchasers, *per formam doni*, the husband of the niece could, upon no possible contingency, become a tenant by the curtesy thereof. *Ib.*

5. A testator, after various dispositions of portions of his property, directed, that after the death of his wife, the whole of his estate, real, personal and mixed, should be sold, "and the money arising therefrom to be disposed of as follows:" one hundred dollars to a charitable purpose, "and after which sum is paid, the *residue* is to be *equally divided and paid* to the following named persons, viz: To the children of my sister, *H B*, deceased, *Sarah*, *Levi*, *Deborah*, *Jeremiah* and *Slater*. To the children of my sister, *R R*, *Elisha*, *Joel*, *Sarah* and *Susannah*. To the children of my brother, *E E*, deceased, *George* and *John*. To the children of my brother, *J E*, deceased, *Isaac*, two shares, *Samuel J*, and the children of his daughter, *S K*, deceased, namely, *John* and *Hannah*, share and share alike, with the exception of *Isaac's* two shares, aforementioned." HELD: That the words, "share and share alike, with the exception of *Isaac's* two shares," are not to be confined to the last sentence, but apply to the whole clause, and that the children here mentioned are to take *per capita*, and not *per stirpes*. By dividing the fund into as many equal parts as there are legatees, counting *Isaac twice*, the proportion of each legatee is ascertained, and the distribution designed by the testator effected. *Brown, et al., vs. Ramsey, et al.*, 348.

*See* TESTAMENTARY CAPACITY.

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